Office Supreme Court, U. S.
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# IN THE SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1922.**

## No. 464.

**GEORGIA RAILWAY & POWER COMPANY, ET AL., PLAINTIFFS IN ERROR AND PETITIONERS IN CERTIORARI.**

**vs.**

**THE MAYOR AND COUNCIL OF THE CITY OF COLLEGE PARK, DEFENDANT IN ERROR AND RESPONDENT IN CERTIORARI.**

On writ of error and petition for certiorari to the Supreme Court of the State of Georgia.

**MOTION BY PLAINTIFFS IN ERROR AND PETITIONERS IN CERTIORARI TO ADVANCE**

WALTER T. COLQUITT
J. PRINCE WEBSTER
LUTHER Z. ROSSER
ATTORNEYS FOR MOVANTS,
PLAINTIFFS IN ERROR
AND
PETITIONERS IN CERTIORARI.

IN THE

# Supreme Court of the United States

## OCTOBER TERM, 1922

GEORGIA RAILWAY & POWER COMPANY, GEORGIA RAILWAY & ELECTRIC COMPANY.

J. D. Malsby, J. R. Hardin, F. McDonald, Jr., C. M. Binder, J. C. Gorman, A. L. Curtis, J. E. Phillips, J. H. Glenn, P. L. Provabo, H. L. Gloer, F. D. Hadley, B. T. Simpson, J. L. Murphy, D. N. Baldwin, C. E. Bennett, W. E. Flowers, H. L. Willis, T. F. Johnson, W. E. Field, R. L. Walker, C. C. Barfield, M. W. Hawn, P. E. Davis and C. Roessler,

Plaintiffs in Error
and
Petitioners in Certiorari

vs.

THE MAYOR AND COUNCIL OF THE CITY OF COLLEGE PARK,
Defendant in Error
and
Respondent in Certiorari

**Number 464**

## MOTION TO ADVANCE.

Georgia Railway & Power Company, et al., plaintiffs in error and petitioners in certiorari, move that the above stated cases, (docketed as No. 464), be advanced for hearing at an early date, for the following reasons:

1. The above stated case is pending on writ of error and also on petition and application for certiorari, directed to the Supreme Court of the State of Georgia.

2. The questions involved in the said case are as follows:

(a) Whether the municipal action of the Mayor and Council of the City of College Park of November 6th, 1905, was a rate ordinance or a rate contract. If a rate ordinance, it is clearly and without dispute confiscatory and unconstitutional.

(b) Whether the said rate ordinance or contract is so discriminatory as to deprive the intervenors and all patrons of the street railway company, not boarding or alighting from cars within the limits of College Park, of the equal protection of the law guaranteed by the 14th amendment to the Constitution of the United States.

(c) If the action of the Mayor and Council of the City of College Park of November 6th, 1905, be held to be a rate contract; whether certain subsequent acts of the State of Georgia and orders of the Railroad Commission of Georgia enlarged, extended and imposed additional burdens upon the obligations of said contract and upon the obligations of prior contracts, so as to render the said acts and the orders of the commission unconstitutional and illegal in violation of Article 1 Section 10 of the Constitution of the United States.

(d) Whether the ordinance of November 6th, 1905, violated the 14th Amendment to the Constitution of the United States when construed by the State court as forcing the Georgia Railway & Power Company to continue to operate the College Park street car line when it is undisputed that to do so costs the company very much more than it receives from its fares, and is, therefore, confiscatory.

(e) Whether certain acts of the State of Georgia, construed by the highest court of Georgia, as placing under the jurisdiction of the Railroad Commission of Georgia, the authority to fix and establish rates in some cases and denying jurisdiction over rates in other cases, renders said acts unconstitutional, in that it deprived petitioners of the equal protection of the law and fixed a discriminatory, confiscatory

and illegal scheme of rates in violation of the 14th Amendment to the Constitution of the United States.

3. The matters herein involved are of great public interest; the constitutionality of several acts and of acts conferring jurisdiction over rates upon the Railroad Commission of the State of Georgia, as well as certain orders of the commission, are involved; and the determination of these questions are of pressing importance, not only to the public service corporation, but to the State itself.

4. The early decision of this case is exceedingly important to the Street Railway Company and to all its patrons (except such as enter and depart from cars in the limits of the City of College Park), for under the rate ordinance or contract in question and the orders of the Railroad Commission of the State of Georgia all the patrons riding upon any of the lines of the Georgia Railway & Power Company are charged a fare of 7 cents, except those boarding or alighting from cars within the corporate limits of College Park (and Decatur) and these latter pay a fare of only 5 cents for which they are entitled to demand and receive transfers entitling them to ride over all the street railway lines of the Georgia Railway & Power Company for a 5 cents fare, although all the other patrons are charged 7 cents.

It costs the Georgia Railway & Power Company more than double the fare of 5 cents to transport College Park patrons, and necessarily this over-cost is inflicted upon the Georgia Railway & Power Company or is borne by other patrons of the Street Railway Company. This palpable and gross discrimination is not only hurtful to the Georgia Railway & Power Company and its patrons, but is a constant source of annoyance to the public. The Railroad Commission of the State of Georgia has disapproved and expressly declared the College Park rate to be both discriminatory and confiscatory and regretted their inability to correct it and

urged correction thereof by the Mayor and Council of College Park.

The continuation of such discrimination "leads to consequences dangerous to public interest, peace and tranquility the extent of which it would be difficult in advance to perceive," (194 U. S. 517) and renders the determination of the questions raised in this case of pressing importance to the State, as well as to the public service corporations.

WALTER T. COLQUITT

J. PRINCE WEBSTER

LUTHER Z. ROSSER
Attorneys for Movants
Plaintiffs in Error
and
Petitioners in Certiorari

TO:

THE MAYOR AND COUNCIL OF THE CITY OF COLLEGE PARK AND GEORGE P. WHITMAN, ITS COUNSEL:

You are hereby notified that on the 2nd day of January, 1923, or as soon thereafter as the same can be presented, the foregoing motion and application for the advancement of the above named case, will be presented to the Supreme Court of the United States for appropriate action thereon.

This 12th day of December, 1922.

WALTER T. COLQUITT

J. PRINCE WEBSTER

LUTHER Z. ROSSER
Attorneys for Movants
Plaintiffs in Error
and
Petitioners in Certiorari

Service of the above and foregoing motion and application

for advancement and of the notice of presenting the same is hereby acknowledged, service and receipt of copy of said motion and notice are hereby accepted and acknowledged.

GEORGE P. WHITMAN

J. L. REYNOLDS
Attorney for the Mayor and Council
of the City of College Park.

This 12th day of December, 1922.

Office Supreme Court, U. S.
FILED
APR 16 1923
WM. R. STANSBURY

# Supreme Court Of The United States

## October Term 1922

## No. 464

GEORGIA RAILWAY AND POWER COMPANY, et al.,
Plaintiffs in Error and Petitioners in Certiorari,

vs.

THE MAYOR AND COUNCIL OF THE CITY OF COLLEGE PARK, Defendant in Error and Respondent in Certiorari.

**FROM THE SUPREME COURT OF THE STATE OF GEORGIA.**

**Brief for Defendant in Error and Respondent in Certiorari.**

GEO. P. WHITMAN,
Attorney for Defendant in Error and Respondent in Certiorari.

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**IN THE**

**SUPREME COURT OF THE UNITED STATES**

GEORGIA RAILWAY & POWER COMPANY,
GEORGIA RAILWAY & ELECTRIC COMPANY,
J. D. Malsby, J. R. Hardin, F. McDonald, Jr., C. M. Binder, J. C. Gorman, A. L. Curtis, J. E. Phillips, J. H. Glenn, P. L. Provano, H. L. Gloer, F. D. Hadley, B. T. Simpson, J. L. Murphy, D. N. Baldwin, C. E. Bennett, W. E. Flowers, H. L. Willis, T. F. Johnson, W. E. Field, R. L. Walker, C. C. Barfield, M. W. Hawn, P. E. Davis and C. Roessler,
Plaintiffs in Error
and
Petitioners in Certiorari,
vs.
THE MAYOR AND COUNCIL OF THE CITY OF COLLEGE PARK,
Defendant in Error
and
Respondent in Certiorari.

No. 464, October Term 1922.

## STATEMENT OF CASE.

The "Statement of Case" in brief of plaintiffs in error and petitioners in certiorari (hereinafter referred to as plaintiffs in error), is not, in our opinion, full enough properly to present the questions involved, and, for that reason, and because certain statements therein set forth are controverted, defendant in error and respondent in petition for certiorari (hereinafter referred to as defendant in error) makes the following statement of the case.

### THE PLEADINGS.

**Petition and Amendments:** On October 18, 1920, The Mayor and Council of the City of College Park, a municipal corporation of Fulton County, Georgia, filed in the Su-

perior Court of that County, its equitable petition against the Georgia Railway & Power Company, and its alleged lessor, the Georgia Railway & Electric Company, alleging the grant by it, the petitioner, to the Electric Company, during the years 1902 and 1905, of certain pleaded franchise contracts; the 1905 contract stipulating, **inter alia,** that the grant was made, "provided: *** That no greater fare than that of five cents for each passenger be charged for passage from the southern limits of said City of College Park to some central point in the City of Atlanta"; that from the time of making the franchise contract of 1905, until 1912, when its property, lines and franchisees were leased by the Electric Company to the Power Company, the Electric Company charged a five cent fare to Atlanta from College Park, and from Atlanta to College Park, and that since 1912, the Power Company had done likewise; that the parties had, by their conduct, construed the franchise contract in question to relate to fares in both directions on the College Park line; and that there had never been a discontinuance of the charge of five cents for such service by either Company.

The petition further alleged that the franchise contract of 1905 had been held upheld as valid and binding, in a mandamus suit by the Power Company against the State Railroad Commission, to which petitioner was a party by representation, and that the judgment therein was res adjudicata. (A complete copy of the record in the mandamus case, including the judgment of the State Supreme Court therein, was pleaded by way of amendment to the petition. Record, pp. 58 to 128, and pp. 153 to 192).

It was further alleged that during the year 1906, and before the Electric Company had completed its double track construction under the franchise contract of 1905, it granted free transfers to passengers to and from College Park, to and from other transfer points on its lines; that the Power Company kept in force this free transfer privilege when it began the operation of the street railway system, and that there had been no discontinuance thereof; and that an application of the Power Company to the State Railroad Commission in April, 1919, for withdrawal of free

transfers from its College Park traffic, was upon hearing, denied.

It was also alleged that two regular sessions of the General Assembly of Georgia had been held since the judgment of the State Supreme Court in the mandamus case, without the enactment of any legislation nullifying the franchise contract of 1905, or the proviso of an Act of the General Assembly of Georgia of 1907, (hereinafter discussed), or giving the State Railroad Commission, or any other agency, the power to increase College Park fares; but had expressly refused to do so.

Certain orders of the Railroad Commission were pleaded by the petition, and also by an amendment thereto, as independent bases for certain relief prayed. (Record, pp. 55, 56, 150, 151, 152).

The petition further alleged that on or about October 5, 1920, the Electric Company and the Power Company served the authorities of petitioner with a pleaded notice, that from and after October 20, 1920, the fare to and from and between Atlanta and College Park on the line operated by the Power Company would be at the rate of seven cents; denying the validity or legality "of any so-called contract provision limiting the fare to five cents", set out in ordinance of November 6, 1905; and giving notice "that if the provision with reference to fare was binding at any time, it is not now binding or legal and is hereby terminated from and after the above named date."

Alleging that the franchise contracts were, and all the while had been, valid and binding contracts, and also that the Electric Company and Power Company were estopped from denying their validity; and denying that the Power Company was losing money on the College Park traffic, and averring that the service in and for College Park was inadequate, contrary to the orders of, and less adequate than required by, the Railroad Commission, and not worth more than five cents; it was charged that the threatened conduct on the part of the Companies, as set out in the notice, would constitute a breach of the contracts, a viola-

tion of the orders of the Railroad Commission, and also a violation of the laws of the state, and an unauthorized and illegal exercise of the sovereignty thereof. It was also alleged that certain Federal and State Constitutional rights of petitioner would be violated by the act threatened by the Companies in said notice.

The prayers of the petition, as amended, were that the Companies be restrained and enjoined from putting into effect their threatened conduct, as set forth in the notice; from increasing the fares from College Park to Atlanta, and **vice versa, until the same is allowed by the laws of this State;** from violating the franchise contracts, and each of them; from changing the status as to fares, transfers or service relative to petitioner, and the College Park line; that if not already so decreed, the franchise contracts be decreed to be valid, subsisting and binding contracts, and the Companies be required specifically to perform the same, and each and every part of each of said contracts; and that the Companies be restrained and enjoined from violating the rules, orders or regulations attached to the petition and an amendment thereto, and be required to perform and carry out the same.

(Record, pp. 44 to 51, 151).

**The Pleaded Franchise Contracts:** In 1901, the Mayor and Council of the City of College Park, upon the petition of certain individuals, granted them the right to lay a single track on a certain street of the City, and to operate an electric street railway over same, through the limits of the City, under stated conditions. (Record, pp. 44, 51, 52); this grant, in 1902, was transferred to the Atlanta Railway & Power Company (Record, pp. 44, 52), and thereafter, during the same year, transferred by that Company to the Georgia Railway & Electric Company (Record, pp. 44, 107, 108); which latter transfer was consented to by the Mayor and Council of the City of College Park, and the original grant and consent to construct, equip and operate a street and suburban railway along the roads and streets named in that grant, and the consent and permission therein contained, were regranted and reconsented

to the Georgia Railway & Electric Company, its successors and assigns. (Record, pp. 44, 53).

On November 6, 1905, the Mayor and Council of the City of College Park granted, in the form of an ordinance, to the Georgia Railway & Electric Company, its successors and assigns, the right, permission, consent and franchise to convert its then single track line of electric railway within the limits of the City of College Park into a double track line of electric railway; "and for this purpose to construct, electrically equip and operate such double track line of electric railway, and to make such changes in the existing structures as may be necessary to the equipment and operation of such double track line, and to do all other acts and things necessary and incident to the equipment, maintenance and operation of a system of double track electric railway in said City of College Park, **provided**:

"1st. That the course of said double track shall extend from the northerly limits of the City of College Park, along the street known as the chert road and along its continuation as a public road in Clayton County, to the southern limits of the City of College Park.

"2nd. That no greater fare than that of five cents for each passenger be charged for passage from the southern limits of said City of College Park to some central point in the City of Atlanta".

The ordinance also provided for the weight of rails to be laid; the location of the tracks on the road or street in question; and the manner of the conduct of the work in laying same. It was also provided that the life and duration of the franchise therein granted should be coincident with the franchise then owned by the Company in the City of College Park.

The second section of the ordinance provided: "That said Georgia Railway & Electric Company shall have fifteen days from this date within which **to accept** the foregoing franchise; and **if its acceptance within that time be signified in writing,** then said Georgia Railway & Electric Company, its successors and assigns, shall have twelve

months within which to equip and operate said line of double tracks; but if said double track line shall not be put in operation within twelve months from the date of **the acceptance in writing of the foregoing franchise,** then said franchise shall stand revoked."

Within fifteen days from the date of the ordinance, to-wit, on November 18, 1905, the Georgia Railway & Electric Company accepted in writing the ordinance and franchise granted by it, in the following language:

"Atlanta, Ga., November 18, 1905.

Honorable Mayor and Council of College Park,
College Park, Ga.

Dear Sirs:-

In accordance with the requirements of Section 2 of the ordinance adopted by your Honorable Body, November 6, 1905, providing for the construction of a double track railway line on the chert road through the City of College Park by this Company, the Georgia Railway & Electric Company hereby **accepts** said ordinance and the franchise granted by it by the said ordinance, and **agrees** to the terms and provisions of said ordinance, and **agrees** to construct, electrically equip and operate the double track line of electric railway as provided by said ordinance."

(Record, pp. 53, 54, 55).

**Answer and (so-called) Cross-bill:** On October 30, 1920, the Power Company and Electric Company filed to the petition what they termed an answer and cross-bill, the first twenty-six paragraphs of which more specifically constituted an answer to the allegations of the petition, either by way of admission or denial, or failure to make admission or denial, for want of sufficient information; and the remaining paragraphs, twenty-seven to fifty-five, by way of "further answer and cross-bill", alleging certain matters and objections, by way of defense to the relief sought by the petition, and perhaps, as basis for the alleged relief sought by the so-called cross-bill. Some of these matters or objections did not raise any constitutional questions, either State or Federal; others invoked certain pro-

visions of the State Constitution; while still others related to or were predicated upon both State and Federal constitutional provisions.

In view of the fact that it is contended that the Assignments of Error made for the purpose of bringing this case to this, the Federal Supreme Court, cannot be looked to for, or be made the basis of, a right of review here, unless supported by the record; and in view of the State practice relative to the decision of constitutional questions by the State Supreme Court (which matters are hereinafter discussed), it is deemed proper here to set forth substantially th contentions made by the answer and so-called cross-bill, insofar as they specifically relate to Federal constitutional questions, in order that any conflicts between such contentions, as pleaded, and said Assignments of Error, and also any contentions made alone by the Assignments of Error, may be made clearly to appear. Reference is omitted of general allegations of unconstitutionality, without designation of the particular State or Federal constitutional provision claimed to have been violated or invoked, for the reason that under the State practice, contentions in such form would not be considered, and for the further reason that, under the well-settled rule of the Federal Supreme Court, such contentions would be referred to State, rather than to Federal, constitutional provisions, even if considered at all. Likewise, objections made or contentions raised involving State constitutional questions, even though well pleaded, are here omitted, for the reason that such questions, under principles firmly established by the Federal Supreme Court, are matters of local concern, and will not be considered by that Court; subject, of course, to the limitation hereinafter discussed with respect to the power of that Court to inquire into and determine the question of the existence of a contract, and questions incident thereto, when certain Federal constitutional provisions are invoked.

**Federal Contentions in Answer and (so-called) Cross-bill:** (a) In paragraph fifty of the answer and so-called cross-bill, it is alleged that the Railroad Commission of the

State claims, and that it had assumed, jurisdiction over the Companies with reference to the fixing and regulation of service on the College Park line and traffic; that it had for some time regulated the number of cars and required additional service to that furnished at the time of entering into the five-cent fare provision; that at the time of entering into the contract provision, the service furnished was six cars per hour; that "under **the orders** of the Railroad Commission of Georgia and under its supervision the present service on said line amounts to twelve cars per hour. Defendants further say that in the Commission's order of September 22, 1920, the said Commission's order provides that defendants, as early as practicable and within 6 months from October 1, 1920, should operate trailers on its College Park route on each schedule now operating during the morning and afternoon rush hours as now established, to wit, during the hours of 6:30 to 9:00 (approximately) in the morning and 4:45 to 7:15 (approximately) in the afternoon. Defendants say that the Commission itself in its said order of September 22, 1920, states that to perform the present service on said College Park line under a 5 cent fare is not fairly compensatory. Defendants say that said action of the Commission in ordering defendants to increase their service, **if the Commission has power to make such order,** is an order by the State of Georgia and is an order, **which together with its other orders on said line,** makes the additional service rendered on said line confiscatory, and that **if the law** gives such power to the commission and **such orders** are valid, the said contract provision for a 5 cent fare **with said increased service** will amount to confiscation of defendants' property without compensation, without due process of law and would deprive the defendants of the equal protection of the law in contravention of the 14th amendment of the Constitution of the United States". (Record, pp. 142, 143). The order of the Railroad Commission, above referred to, is set out by way of exhibit, to the answer and so-called cross-bill, and so far as is here material, is as follows: **"That as early as practicable, and if the necessary equip-**

**ment can be secured,** within six months from October 1st, 1920", trailers should be operated on the College Park route during the morning and afternoon rush hours.

(b) In paragraph fifty-one, it is alleged that under the 14th amendment of the Federal Constitution, the Railroad Commission of the State cannot have authority to order **changes or additions to defendants' service,** while it has no power or authority to increase the fare to a point where it will pay for the **additions and changes in service** and provide a reasonable return upon the value of the property used in performing **said service;** that on February 5, 1917, petitioner formally requested the Commission to regulate service on the College Park line; that "it (if) petitioner undertook to get the benefits of the jurisdiction of the Railroad Commission with reference to the regulation of service, which jurisdiction it asserts, it would be **the action of petitioner** which would cause a confiscation of defendants' property in violation and in contravention of the *** 14th amendment of the Constitution of the United States." (Record, pp. 143, 144). The request above mentioned merely asked for an investigation of traffic conditions, and a remedy for same **in such way and manner as might seem just and right, both to the Company and to the public.** (Record, pp. 149, 150.)

(c) In paragraph fifty-two, it is alleged that if the Act of 1907, pages 73, et seq., is given the construction that under it, the Railroad Commission can require the defendants to make changes and additions to the College Park service, without having the power to increase rates of fare with reference to such service, the Act is now confiscatory, unconstitutional and void; that complying with the orders of the Commission with reference to service, the expense thereof per passenger with respect to College Park traffic is at least 13.957 cents; and that under the present state of facts, "any legislative act which deprives the Commission of the power to increase the rate of fare but grants it the power to increase service to such an extent that such increased service will require an income in excess of that produced by any rate of fares protected by said act would make the said act of the legislature confiscatory,

illegal and void and in contravention of *** the 14th amendment of the Constitution of the United States; *** and defendants say that **either** said act of 1907 is void for the reason aforesaid, OR the exception to said act providing 'nothing herein shall be construed to impair any valid, subsisting contract now in existence between any municipality and any such company, and provided this act shall not operate as a repeal of any existing municipal ordinance', is illegal, void and unconstitutional for the reasons just stated, and **defendants attack said exception."** (Record, pp. 144, 145).

(d) In paragraph fifty-three, it is alleged that if the contract provision relative to fares is held to come within the exception of the "act of 1907, page 73 et seq.", just above quoted, then the exception of the act is invalid and unconstitutional for the reason that it does not provide for a legal classification, and consequently, contravenes the 14th amendment to the Constitution of the United States, insuring to parties due process of the law and the equal protection of the law. (Record, pp. 145, 146). **It should here be noted** that this attack upon the exception above quoted, to the Act of 1907, makes no reference whatever to the amendatory Act of August 18, 1919 (Georgia Laws, 1919, page 94), referred to in the Third Assignment of Error of plaintiffs in error, and sub-paragraph (a) thereof. (Record, pp. 6, 7). Furthermore, the Act of 1919 is not mentioned or referred to in any of the assignments of error contained in the bill of exceptions or writ of error from the trial court to the State Supreme Court in this case. (See particularly, Record, pp. 35, 36).

(e) In paragraph fifty-four, it is alleged as follows: "Defendants say that constitutionally they cannot be required to operate their said property under and by virtue of any so-called contract provision within the limits of College Park at a loss and it is impossible to continue to operate it at 5 cents save at a continuing loss and defendants say that under the constitution *** of the United States as contained in section 6700 of the Georgia Code (14th amendment), defendants would be deprived of their

property without due process of law, if they should be required to operate their cars within the corporate limits of College Park under the so-called franchise contract". (Record, p. 147).

**Prayers of Answer and (so-called) Cross-bill:** In paragraph fifty-four of the answer and so-called cross-bill, the following language appears: "If it be held by the court that defendants cannot terminate said contract provision, without at the same time giving up the right to operate its cars within the municipal limits of College Park and giving up any right they may have under the other provisions of said so-called franchise contract, defendants say that they hereby surrender all rights they may have under and by virtue of said so-called contract franchise and ask the court to declare all their rights under and by virtue of said contract null and void and to relieve the defendants of operating said line within the limits of College Park and to permit defendants to take up their said tracks within the corporate limits of College Park. *** If the court should hold that said so-called contract provision limiting the fare to 5 cents must be performed and is binding unless defendants abrogate the entire so-called franchise contract and terminate the entire contract, defendants hereby offer to surrender the entire contract and cease to operate cars in or within petitioner's territorial limits." (Record, p. 147).

**Attention is called to the fact** that this language is not only inconsistent with that of the last paragraph (fifty-five) of said answer and so-called cross-bill (Record, p. 147), but is also contained in that part of the pleading, which would be somewhat akin or analogous to the stating or charging part of a bill, if, indeed, the pleading is anything more than defensive in its nature, which, it is contended, is not the case. There is nothing whatever in the prayers of said answer and so-called cross-bill, relating to or embracing the conditional suggestions covered by the language in question. The defendants prayed merely that the "so-called contract provision" be declared unenforceable as a valid and binding contract between the parties;

that it be declared illegal, void and unconstitutional, and terminated and of no force and effect; that the plaintiffs and **all other parties** be restrained and enjoined from in any way or manner enforcing or undertaking to enforce said provision, and from interfering **with defendants fixing and establishing** reasonable, just and non-discriminatory fares or rates of fare with respect to the College Park traffic, and from in any manner or in any way interfering **with defendants enforcing and collecting** such reasonable, just and non-discriminatory fares **as are fixed by defendants.**

**Amendment to Answer:** On November 3, 1921, the Power Company and Electric Company filed an amendment to **their answer,** which was verified by an officer of each Company; the verification stating that the **new facts of defense** set out in the **amendment to the answer,** were not omitted for the purpose of delay, and that the amendment was not offered for delay. (Record, pp. 200, 201).

By this amendment, the same questions of law which were raised by the original answer and so-called cross-bill- are reiterated, reclothed and elaborated. (Georgia Railway & Power Co. vs. Decatur, 153 Ga. 329, 331). Certain contentions made in the originaal answer relative to the existence of a valid contract, depending upon the questions of power to contract, right of abrogation, and the nature of the contract, and also the effect of certain provisions of the State Constitution upon these questions, were repeated in the amendment. (Record, pp. 195, 199, 200). By the amendment, it was claimed that the contract in question violated that provision of the State Constitution, **inter alia,** contained in Section 6389, of the State Code; which, though not specifically mentioned in the original answer, had been thoroughly considered, upon presentation and argument, by the State Supreme Court, in a decision in the same case, previous to the decision or judgment from which the present writ of error has been sued out. (Georgia Railway & Power Co. vs. Decatur, 153 Ga. 329, 331).

In the original answer it was contended by the defend-

ants that the so-called contract provision as to fares did not undertake to fix fares from Atlanta to College Park, or from any point in College Park, other than from the "southern limits" thereof, to Atlanta; and it was also contended that said fare provision did not apply to seven hundred and eighty feet of territory which had been added to the City of College Park by extension of its northern limits after the date of the execution of the contract. (Record, pp. 136, 137). In the amendment it was alleged that the extension of the limits of College Park was by Act of the Legislature of August 20, 1906, (Ga. Laws 1906, p. 650 et seq.); that this added territory had already been occupied by the defendants' tracks under grants from Fulton County, accepted by the Companies, or their predecessor, under state statutes providing that no street or suburban railway can lay its tracks in the public roads of any county without the consent of the proper authorities of the county; which grants contained no fare provision; and it was further alleged that in 1919, the Railroad Commission had permitted the defendants to charge a fare of six cents over all lines, except that part of the College Park line covered by the College Park contract; and later, by another order, a fare of seven cents, with the same exception. Therefore, it was alleged that **if the courts hold that the effect of the extension Act was to extend,** by virtue of the contract with College Park, the five-cent fare over the added territory, that Act, to wit, the Act of 1906, would impair the College Park contract, in violation of the contract clause of the Federal Constitution, because, under the contract, the defendants were to charge only five cents "from the southern limits of said City of College Park to some central point in the city of Atlanta", and it would be an extension and violation of the contract to extend the five-cents fare from and to the added territory not then a part of College Park. It was also alleged that **if said Act of 1906 shall be construed** to add the territory thereby annexed to College Park, to the five-cents area provided for in the College Park contract, then said Act of 1906 would impair the obligations of the contracts with Fulton County,

in violation of the contract clause of the Federal Constitution. (Record, pp. 196, 197, 198).

The question of the territorial operation of the fare provision of the College Park contract is, in like manner, again made by the amendment, by the suggestion that **if the courts shall so construe** the exception or proviso clause of the Act of 1907, or the orders of the Railroad Commission, fixing six and seven cent fares, as excepting all points from Atlanta to all points in College Park, and all points in College Park, other than its southern limits, to some central point in the City of Atlanta, such Act and orders, will impair the College Park contract, in violation of the contract clause of the Federal Constitution.

The amendment further alleges that **if the court construes** the Act of 1907 so as to give the Railroad Commission power to increase quality and quantity of service over that in force at the time the contract was made, then the contract would be impaired, in violation of the contract clause of the Constitution of the United States; and **if the court does not so construe the Act of 1907,** then orders of the Commission, since that Act, increasing the quality and quantity of service in, to and from College Park, being the acts of the State, by increasing the cost of service, so impair such contract.

In the original answer it was admitted (paragraph ten) that when the Power Company took charge of the Electric Company's system of street railway, and began to operate same, it kept in force the free transfer privilege to and from College Park, as had been afforded by the Electric Company, and that there had been no discontinuance of same (Record, pp. 45, 130), but the Companies denied the authority of the Railroad Commission to require the issuance of transfers to the College Park traffic, and claimed that **they themselves** had the right, power and authority to discontinue same; and they further alleged that the contentions made in the answer and so-called cross-bill "with reference to illegal, discriminatory and unconstitutional rates with reference to College Park traffic also apply with reference to transfers demanded by and issued

to such passengers". (Record, pp. 130, 131). In the amendment to the answer, it is alleged that an order of the Railroad Commission declining the request of the Companies for permission to discontinue the practice of giving transfers, impaired the College Park contract, **if the court holds the contract valid.** (Record, p. 199).

**The amendment to the answer was purely defensive;** expressly so limited in its verification; and contained no prayers whatever for any relief, even if otherwise justified (which is denied), on account of the matters set forth therein.

**The Intervention:** On November 20, 1920, certain individuals intervened in the case, filing what was claimed to be an answer and cross-bill therein, "praying, **inter alia,** in said answer and cross-bill, that the so-called contract provisions with reference to College Park traffic be declared to be illegal, unconstitutional and void, and that the same be cancelled". (Record, p. 24). While the Praecipe in this case specifies the Bill of Exceptions and Record from the Superior Court of Fulton County (trial court) to the Supreme Court of Georgia (Record, p. 13); and the Record referred to includes the answer and cross-bill of the individual intervenors (Record, p. 42), such answer and cross-bill seems to be omitted from the printed Transcript of Record in this Court.

**Demurrers and Motions to Srike:** Prior to the interlocutory hearing, hereinafter referred to, demurrers were interposed to the original answer and so-called cross-bill, and also to the intervention above mentioned. Under the State practice these demurrers were not formally passed upon in that hearing. The amendment to the answer of the defendants was filed after that hearing and after the judgment therein had been affirmed by the State Supreme Court. After the affirmance of that judgment, additional demurrer and motion to strike was interposed to the original answer and so-called cross-bill, and to the amendment to the answer, and to the original answer and so-called cross-bill, as amended by said amendment. All de-

murrers were sustained on January 18, 1922, with the result that the intervention was stricken; and the original answer and so-called cross-bill and the amendment to the answer, were, likewise, stricken, except insofar as the answer either specifically admitted or denied the allegations of the petition, or neither admitted nor denied the allegations thereof for want of sufficient information. (Record, pp. 192, 201, 204, 25). The demurrer to the intervention, though covered by the Praecipe, and the bill of exceptions from the trial court (Record, p. 42), does not appear in the printed Transcript of Record in this Court.

The grounds of demurrer and motion to strike were general in their nature; one of the grounds of demurrer, **inter alia,** being that the matters and things alleged as grounds of defense, or for relief, were concluded by the decision, ruling and judgment of the State Supreme Court and of the trial court in the case of Georgia Railway & Power Company vs. Railroad Commission of Georgia, 149 Ga. 1. (Record, pp. 202, 203).

**Verdict and Judgment:** The case made by the petition having been proved as laid (Record, pp. 26 to 32), and the defendants having offered no evidence whatever, notwithstanding their answer was still in to the extent above mentioned, the trial court directed a verdict in favor of the petitioner, and thereupon a decree or judgment was rendered granting to the petitioner the relief prayed by it. (Record, pp. 34, 204, 205). This judgment or decree was excepted to, as were the rulings of the trial court on the demurrers and motion to strike, and on certain requests to charge made by the defendants on the trial, in writ of error to the State Supreme Court (Record, pp. 24 to 44), with the result that the judgment of the court below was affirmed by the Supreme Court of the State. (Record, pp. 18, 23). It is to this judgment that the present writ of error was sued out, and with respect to which petition for writ of certiorari has been presented.

## ASSIGNMENTS OF ERROR

The Assignments of Error, considered in the light of the constitutional questions raised by the pleadings, or by the record, and passed upon by the State Supreme Court, if so passed upon in the judgment now under review, are, in part at least, subject too be either disregarded or modified, as hereinafter contended and set forth.

## BRIEF.

### THE WRIT OF ERROR SHOULD BE DISMISSED FOR WANT OF JURISDICTION TO ENTERTAIN IT.

The fundamental question of jurisdiction of the Federal Supreme Court presents itself on every writ of error, and must be answered by the Court, whether propounded by counsel or not.

Defiance Water Co. vs. City of Defiance, 191 U. S. 184, 194; 48 L. ed. 140, 144;

Northern Pacific R. Co. vs. Solum, 247 U. S. 477, 481; 62 L. ed. 1121, 1125.

The case at bar has been before the State Supreme Court twice. The first writ of error from the trial court was from the grant of an interlocutory injunction against the plaintiffs in error, both below and here, and a decision by the State Supreme Court was rendered thereon, affirming the judgment below, on September 27, 1921. (152 Ga. 143, 108 S. E. 615; Record, pp. 18, 22). The second writ of error from the trial court was, as above indicated, from judgment or decree, of date, January 18, 1922 (Record, pp. 34, 204), which judgment was affirmed by the State Supreme Court on April 29, 1922. (Record, p. 23, and see p. 18; also 153 Ga. 329). This latter judgment, to which the present writ of error was sued out, is predicted upon non-Federal grounds, to wit, the doctrines of **res adjudicata** and "law of the case". The State Supreme Court held: (1) A judgment of a trial court granting or refusing an injunction where the same depends upon a question of law, is, upon its affirmance by the Supreme Court, a **final** adjudication of such question; (2) The rulings of the

Supreme Court, upon interlocutory order of the trial judge granting an injunction, become the **law of the case** as to the particular case; and (3) An affirmance by the Supreme Court of the order of the lower court granting a temporary injunction is a ruling upon all questions of law involved, though the legal contentions may not have been specifically enumerated or mentioned in the opinion of the Court; and applying these rulings or holdings **alone,** affirmed the judgment of the Court below. In the opinion, the Court said: "The present case comes up upon the final hearing in the court below. The exceptions are to the rulings sustaining the general demurrers, the declination of certain requests to charge, and the direction of a verdict in favor of a permanent injunction, and the final decree thereon. The case thus comes before the court the **second time** for review. The first appeal was from the interlocutory order of the trial judge granting a temporary injunction against the plaintiffs in error. A decision therein was rendered September 27, 1921. 152 Ga. 143 (108 S. E. 615). Upon the hearing of the first appeal the court held that the decision of the court in the mandamus case, Georgia Ry., etc. Co. vs. Railroad Commission of Georgia, 149 Ga. 1, was controlling upon the questions then under consideration, and a request for a review of the mandamus case was refused by this court; and, immediately following the refusal to review the mandamus case, the court held: 'And the court is further of the opinion, that, **independently** of this ruling as to the case we are asked to review, **the Georgia Railway & Power Company was without authority to fix the rate** which the plaintiffs in the court below sought to enjoin; and consequently the court did not err in granting the interlocutory injunction'. The effect of this ruling was, that not only **the law in the mandamus case was con-controlling,** but that **independently,** under the questions of law presented in the appeal then under review, the ruling of the trial judge was without error. While the plaintiffs in error now insist that some ten distinct points of attack upon the validity of the contract are made in the present ap- that were not made in the mandamus case (149 Ga. 1), **it is**

**not** and cannot be **insisted** that the identical questions of law were not involved upon the first hearing ofo the interlocutory injunction ** as are now involved upon this second appeal. *** Upon a careful inspection of the entire record, we are unable to find a question of law or fact that was not involved in the former hearing upon the interlocutory order granting the injunction, or in the mandamus case. The same questions of law are reiterated by amendment, reclothed and elaborated; but it is not difficult, upon a careful inspection, to find that we have met them before. ** the last ruling ** is clearly **res adjudicata,** in our opinion, of the present case. *** The rulings of the court upon an interlocutory grant of injunction become the 'law of the case' upon the final hearing.***when this court reaffirmed the ruling in the mandamus case and held that, **independently** of the mandamus order, the trial court did not err in granting the interlocutory order, it was an adjudication of every attack upon the validity of the contract in question, even though the numerous objections may not have been specifically ruled upon in the opinion of the court. ** In the light of the rulings above stated, we are convinced that this case has had its day in court. ** the ruling in the 152 Ga. 143 (108 S. E. 615) is not only **res adjudicata of every issue involved in the present hearing,** but is the 'law of the case' in the case now under review."

It will thus be seen that the State Supreme Court, in its opinion and judgment—the judgment from which the present writ of error was sued out—rests upon an independent ground not involving a Federal question and broad enough to sustain the judgment. It is predicated not only upon the doctrine of the 'law of the case,' but also upon the doctrine of **res adjudicata,**— a doctrine well established by prior decisions of the State Supreme Court. The interlocutory judgment, upon its affirmance by the State Supreme Court, was a **final** adjudication, and was not merely advisory, **but absolutely binding,** both upon the trial court, and upon the Supreme Court on second appeal. The instant case is not the only case ever decided by the State Supreme Court, making the judgment of the appellate court upon an interlocutory injunction final. It merely

follows a long line of its own decisions to that effect. These decisions are cited in the opinion. These cases are of long standing. They leave no room for doubt. Nor is the doctrine peculiar to Georgia. Its existence elsewhere has been recognized by this court, and effect given to it on the identical jurisdictional question here involved.

Northern Pacific R. Co. vs. Ellis, 144 U. S. 458, 464; 36 L. ed. 504, 506;

Yazoo, etc., R. Co. vs. Adams, 180 U. S. 1, 6, 7, 8; 45 L. ed. 395;

See also Rio Grande Western R. C. vs. Stringham, 239 U. S. 44, 60 L. ed. 136.

The recent case of Southern R. Co. vs. Clift, (U. S.) 67 L. ed. 140, does not determine this one. In that case the doctrine of the 'law of the case' merely, was involved, and the constitutional question presented in that case was considered and decided. That case was not constrained by the law of the state; whereas, such constraint does exist in the present case. In that case, the prior ruling directed the **discretion** of the court in its subsequent judgment; in the present case, the prior ruling was **res adjudicata,** superseded discretion and compelled judgment, in submission to its final and binding effect.

Where the State Supreme Court decides and disposes of a case on general law, or on a non-Federal ground, sufficient to sustain the judgment, the Federal Supreme Court will not consider Federal questions mooted and assigned for error, but will dismiss the writ of error, or affirm the judgment, according to circumstances.

Waters-Pierce Co. vs. Texas, 212 U. S. 112, 53 L. ed. 431;

Southern P. Co. vs. Schuyler, 227 U. S. 601, 610; 57 L. ed. 662, 668;

Minneapolis, etc., R. Co. vs. Washburn, etc., Co., 254 U. S. 370; 65 L. ed. 310;

Howat vs. Kansas, (U. S.) 66 L. ed. 322, 324, **and cases cited.**

The interlocutory judgment, upon its affirmance, being

a **final** adjudication, as above indicated, and the Federal questions relied upon to confer jurisdiction upon this Court being involved only in that decision, if at all, and that judgment not having been complained of to this Court by writ of error, or otherwise, (of which this Court will take judicial notice), the present writ of error, to the judgment on the second writ of error from the trial court to the State Supreme Court, will be dismissed.

Rio Grande Western R. Co. vs. Stringham, 239 U. S. 44, 60 L. ed. 136.

If it were legally possible to read into the judgment of the State Supreme Court upon the second writ of error, the decisions or holdings of that Court upon the first writ of error (which, of course, cannot be done except by way of assumption, for sake of argument), the judgment would still have basis in a non-Federal ground sufficient to sustain it, and, therefore, under the authorities above cited, the writ of error would be dismissed.

In 1918 the Power Company, lessee of the Electric Company, petitioned the Railroad Commission to grant an increase of fare over the College Park line. This application was rejected by the Railroad Commission, which held that it was without jurisdiction to grant the increase of fare, under the proviso of the act of August 23, 1907, which prohibited them from interfering with existing rates where there was a valid, subsisting contract. On August 23, 1918, the Power Company sought a mandamus to compel the Railroad Commission to take jurisdiction and to act upon the application for an increased rate over the electric line in question. This application was based upon an attack on the validity of the contract between the City of College Park and the Electric Company. The State Supreme Court upheld the judgment of the lower court denying the mandamus absolute, thus adjudging that the Railroad Commission was without jurisdiction because of a valid, subsisting contract between the parties. (Record, pp. 14, 15).

The State Supreme Court, in its judgment affirming the interlocutory injunction in the present case, held that the

mandamus judgment above referred to, controlled adversely to the plaintiffs in error the issues presented for decision; but that, **independently** of the ruling made in the mandamus case, the Power Company was without authority to fix the rate which the plaintiffs in the court below sought to have enjoined, and that consequently the lower court did not err in granting the interlocutory injunction. In its opinion, the Court said: "Under our law the rate of fare upon this and every electric railway company within the State must be fixed **by the Railroad Commission, unless** there is a valid, subsisting contract made prior to the act of August 23, 1907. ** If there existed, on August 23, 1907, a valid, subsisting contract which fixed the rate, it was conclusive, and neither the Railroad Commission nor either of the parties to the contract can change or alter it. If there was a void contract for any of the numerous reasons urged by plaintiffs in error, then it was not a valid, subsisting contract and **the Railroad Commission only** could and should fix a change in the rate. In the instant case the Power Company is assuming to do what the Railroad Commission refused to do, and what this Court has held they were right in not doing, to wit, declare the contract ** void. *** If this is a void contract, **the Railroad Commission alone** has the right to change the fare. ** Plaintiffs in error are met at the very threshold with the question of their right to declare void this contract of 1903; but, should we grant to them the right to do so, they are met with what appears to be an unanswerable objection, that the Power Company has no right to alter, change, or fix a rate differing from the existing rate under which it has been operating their line of railroad since 1903. *** Whatever conclusion might be reached as to the validiy of the contract, ** it would not affect the conclusion that the **Power Company is without authority** to change or fix rates on its electric lines, and this is exactly what it attempts to do, and what the trial court has enjoined it from doing in the instant case.

"But the ruling of this court in the case of Georgia Railway & Power Co. vs. Railroad Commission, 149 Ga. 1, (98

S. E. 696, 5 A. L. R. 1), if unreversed, is **conclusive** on the issue involved in the instant case, *** the court is further of the opinion, that, **independently** of this ruling, ** the Georgia Railway & Power Company was without authority to fix the rate which the plaintiffs in the court below sought to enjoin."

(Record, pp. 15, 16, 17; 152 Ga. 143, 145, 146, 147, 148).

Thus, it will be seen, the judgment of the State Supreme Court, affirming the interlocutory injunction in the instant case, rests squarely upon the **conclusiveness** of the mandamus judgment; and upon the want of power on the part of the plaintiffs in error, **under the State Constitution and statutes,** to change or fix a rate different from the existing rate on the College Park line, as it threatened to do, even though the contract relative thereto were void. Both of these grounds appear to be non-Federal in their nature. Certainly, the latter is of such character.

**THE CONTRACT AND RELATED FEDERAL QUESTIONS.**

The Federal questions, if timely and properly raised, fall into two groups: Both the due process clause and the equal protection of the laws clause of the 14th amendment, and the contract impairment clause, of the Federal Constitution.

On the one hand, the plaintiffs in error contend, in the main, that what they term the "so-called contract provision" relative to fares on the College Park line, is not a contract; that it is impossible to continue to operate **within the limits of College Park** under such provision save at a continuing loss, and if they should be required to do so, they would be deprived of their property without due process of law, contrary to the 14th amendment. (Record, p. 147; Brief, pp. 10, 11).

On the other hand, the plaintiffs in error contend that the provision is a contract, and if certain acts and orders are construed in certain ways, they would impair its obligations, in contravention of the contract impairment clause of the Federal Constitution.

It is, of course, recognized that when the contract clause of the Federal Constitution is timely and properly invoked, and the Federal Supreme Court has jurisdiction, it will determine, for itself, the question of the existence of a contract, and if found to exist, what obligation arose from it, and whether that obligation has been impaired by subsequent legislation. It is also recognized that where the 14th amendment is likewise invoked, and this court has jurisdiction, it will determine the question of the right of property, the deprivation of which is claimed, and that incident to the determination of this question, it may be necessary to determine, negatively, the existence of a contract. However, in the present case, it would seem to be entirely unnecessary, so far as the contract clause of the Constitution is concerned, to have to determine the prmiary question of the existence of a contract, for defendant in error claims it exists, and plaintiffs in error must take the same claim to invoke the contract clause.

But even in the determination of the question of the existence or non-existence of a contract, which this Court decides for itself, the question is whether there is a contract **under state law.**

Comrs. of Road Imp. District vs. St. Louis, etc., R. Co., (U. S.) 66 L. ed. 230, 234.

And this Court will give "very great respect and weight" to the decisions of the Supreme Court of Georgia on the question (Detroit vs. Detroit Citizens' Street R. Co., 184 U. S. 368, 386); and will lean toward an agreement of view with the State court if the question seems balanced with doubt.

Tampa Waterworks Co. vs. City of Tampa, 199 U. S. 241, 50 L. ed. 170.

And this Court will accept on writ of error the decision of the highest State court as to the meaning of state legislation and the State Constitution, as though such meaning was expressed in both legislation and Constitution.

Thornton, etc., Tool Co. vs. Duffy, 254 U. S. 361, 65 L. ed. 304;

Ward vs. Krinsky, (U. S.) 66 L. ed. 616.

## THE CONSENT FRANCHISE WAS AND IS A CONTRACT BOTH IN FORM AND SUBSTANCE.

In January, 1902, and prior to the transfer, regrant and reconsent to it of the first franchise contract, and prior to the second franchise contract of 1905 (Brief, pp. 5, 6), the Georgia Railway & Electric Company, pursuant to an Act of the General Assembly of Georgia, approved December 17, 1892, and acts amendatory thereof, had been chartered as a corporation by the State of Georgia, for the purpose of owning, constructing, maintaining and operating a street and suburban railroad within the limits of the City of Atlanta, Georgia, and to and from said City to divers points within the County of Fulton, and elsewhere, "subject to the provisions of article four (4) of the Constitution of this State, and all the laws governing railroad companies of force at the date of this certificate, or that may hereafter become of force, either by constitutional or statute law, or by any rules and regulations of the railroad commission of this State, or otherwise, which govern and control the operation of railroads in this State". The charter applied for was for the term of one hundred years. Three amendments, on petition of the corporation, were made to its charter during the years 1902 and 1903; the last of said amendments expressly conferring certain powers and privileges set out in certain provisions of the Code of Georgia of 1895, therein mentioned. (Code of Georgia, 1895, Vol. II, Sections 2180, 2181, 2182 and 2183). (Record, pp. 100, 101, 102, 103).

The present Constitution of the State of Georgia, adopted in 1877, provides (Par. 20, Sec. 7, Art. 3; Park's Ann. Code, 1914, Vol. 5, Sec. 6448): "The General Assembly shall not authorize the construction of any street passenger railway within the limits of any incorporated town or city, **without the consent of the corporate authorities."**

Section 2180 of the Code of Georgia of 1895 (now Section 2600 of Vol. 2, Park's Ann. Code), above referred to, provides, **inter alia,** for the incorporation of suburban and street railroad companies: **"Provided,** that no street-rail-

road incorporated under this Division shall be constructed within the limits of any incorporated town or city without the consent of the corporate authorities: **And provided further,** that all such street-railroad companies incorporated under this Division shall be subject to all just and reasonable rules and regulations by the corporate authorities and liable for all assessments and other lawful burdens that may be imposed upon them from time to time."

Accordingly, under the charter of the Electric Company, and under the Constitution and under the statute law of the State, it was necessary that the Company secure the **consent** of the municipal corporate authorities of College Park before it could occupy the streets of the municipality and operate its line or lines of electric railway in and over same.

The 1901 franchise was the grant, by resolution, of a petition of certain individuals, subject to certain conditions. The 1905 franchise and consent was granted, admittedly upon petition of the Electric Company (Record, p. 32), with certain provisos, and, among others, the maximum rate provision in question. While in the form of an ordinance, the acceptance, in writing, on the part of the Electric Company, was required thereby to be made within a limited time; and was so made in the usual language of contract or agreement. There was a grant, on the one hand, of certain rights which could not be had otherwise than by consent or grant; provided the grantee, on the other hand, should do certain things; the grant required the agreement or acceptance in writing on the part of the grantee before the grant should become operative; and the grantee's acceptance, its agreement, its promises, were made in the form and within the time required. (Brief, pp. 5, 6).

An accepted ordinance constitutes a contract.

Macon R., etc. Co. vs. Macon, 136 Ga. 797, (1-a);

Georgia Railway & Power Co. vs. Railroad Commission of Georgia, 149 Ga. 1 (involving identical contract now in question);

Macon Railway & Light Co. vs. Corbin, No. 3011, Supreme Court of Georgia, decided February 28, 1923; re-

hearing denied March 3, 1923 (not yet reported; hereinafter referred to);

Knoxville Gas Co. vs. Knoxville, 253 Fed. 217;

Columbus R., etc. Co. vs. Columbus, 249 U. S. 399;

Bankers Trust Co. vs. City of Raton, (U. S.) 66 L. ed. 409.

**THE CONTRACT IS A VALID, SUBSISTING AND BINDING CONTRACT UNDER GEORGIA LAW.**

The contract in question has been before the Supreme Court of Georgia, the highest court of the state, three times; and its validity, first established by judicial decision in the mandamus case (Georgia Railway & Power Co. vs. Railroad Commission of Georgia, 149 Ga. 1), has not been denied by the later decisions, but expressly reaffirmed therein. (Georgia Railway & Power Co. vs. Decatur, 152 Ga. 143, 153 Ga. 329; Record, pp. 13 to 23).

The validity of the contract in question was thoroughly considered, upon its attack from many angles, and upheld in the mandamus case. From an inspection of the petition of the Georgia Railway & Power Company in that case, which is a part of the record here (the record in that case having been introduced in evidence by the plaintiff in the trial court in the present case, in support of that portion of its petition wherein the judgment in the mandamus case was relied upon as **res adjudicata** and conclusive) it will be seen (Record, pp. 58 to 71, and particularly latter page) that the question of power to make the contract was raised, both under the charter of the municipality and the Constitution of the State, and the proviso of the Act of 1907 was also attacked on Constitutional grounds.

Again, when the present case went to the State Supreme Court from the grant of the interlocutory injunction, the mandamus case, was upon request, reviewed, and upon review, adhered to. The record before the Court on that hearing contained the original answer and so-called cross-bill of plaintiffs in error, with all the contentions with respect to the contract therein contained (Record, p. 15; 152 Ga. 145).

In the mandamus case it was held that, applying the principle that "a grant of power to a municipal corporation must be strictly construed; and such a corporation can exercise no powers except those which are expressly given, or are necessarily implied from express grants of other powers", a municipality without such express or necessarily implied power, could not pass **a mere regulatory ordinance** fixing rates of fare upon the lines of a street railway constructed within its limits; but it was held that a municipality could **contract** with reference to fares under the circumstances and subject to the limitations therein stated.

In that case, the Court said: "We will first consider the question as to whether, if there were contracts in existence on the 23rd day of August, 1907, between the municipalities named, or any of them, by the terms of which the street-railroad fares were fixed as to that municipality, such a contract would prevent the fixing of the street-railroad fares by the commission. The act to revise and enlarge the powers and duties of the Railroad Commission of Georgia, etc., approved August 23, 1907, contains the statutory provision now embraced in Section 2662 of the Civil Code, and, so far as relates to the questions under consideration in this case, reads as follows: 'The powers and duties hereinbefore conferred by law upon the railroad commission are hereby extended and enlarged, so that its authority and control shall extend to street-railroads and street-railroad corporations, companies, or persons owning, leasing or operating street-railroads in this State: **Provided, however, that nothing herein shall be construed to impair any valid subsisting contract now in existence between any municipality and any such company;**' **. Until the passage of the act of 1907 the commission was without authority to deal with the subject of fixing fares for street-railways. Until the enactment of that statute they did not exercise, as to street-railway companies, the power to make the rates of charges for transportation of passengers on the lines of street-railways operated by street-railway companies, like that of the applicant in this case.

But the act of 1907, as indicated by its caption, extended and enlarged the powers and duties of the commission, and embraced in these enlarged and extended powers and duties there was, among other things, the authority to fix fares upon street-railroads, and to otherwise exercise control over street-railroad corporations or companies operating street-railways, but in section 5 (the section of the act of 1907 extending the powers of the commission so as to embrace authority to fix fares upon street railroads) the legislature enacted as a part of that section the proviso 'that nothing herein (in the statute extending the powers and duties of the commission) shall be construed to impair any valid subsisting contract now in existence between any municipality and any such company' (street-railroad company). In our opinion the effect of the proviso is to leave the commission where it was before the enactment of the statute, as to its power and authority to determine and fix fares upon the street-railroads in any municipality which had a valid subsisting contract covering that subject with the street-railroad company.

"Counsel for the railway company contend in their arguments that it was not competent for the municipality to enter into a contract with the street-railroad company upon this subject; that the fixing of fares upon street-railroads and other railroads is a matter that falls within the police power of the State; **and... ...that under the provisions of the constitution of the State,** especially that part of the constitution which declares that the exercise of the police power of the State shall never be abridged (Civil Code, Sec. 6464), the municipality and the railway company could not make a binding contract upon this subject. We cannot agree with this contention **in full.** We readily assent to the proposition that the regulation of passenger tariffs, the fixing of fares upon street-railways, as well as upon steam-railways, is a matter falling within the police power, and that neither the legislature of the State nor the legislative body of any municipality can, by ordinances or contracts, abridge the exercise of the police power of the State; **but we do not think that in all cases and in reference to every subject**

**which might fall within the police power of the State, it is incompetent for a municipality or other corporation to make a contract in reference to such subject-matter where the State has not seen fit to exercise the police power in reference thereto.** Under the constitution of this State, Art. 3, Sec. 7, Par. 20 (Civil Code, Sec. 6448), the General Assembly cannot authorize the construction of any street passenger railway within the limits of an incorporated town or city without the consent of the corporate authorities. Under such provisions the city authorities may withhold their consent for the construction of a street-railroad upon any of the streets of the municipality. It would seem that if they can do this they might **impose conditions** upon which a railroad company might construct its tracks in the streets, **and enter into a contract with the corporation** as to the conditions upon which it should be permitted to construct a railway within the limits of a municipality. *** Where application is made to the municipal authorities by a street-railroad company for the consent of the authorities to the construction of a railway in its streets, it does not seem sound to say that the city authorities could only say yes or no to such a petition; or that the city is compelled to refuse admission altogether or to admit it without any conditions whatever. *** We do not base our opinion that a **street-railroad company and a municipality may,** under certain circumstances, **contract** with reference to rates of fare **entirely** (Does this not mean the holding is based **partly,** and essentially in part, at least?—this question ours) upon that part of the constitution which provides that the legislature shall not authorize a street-railroad company to construct its railways in the limits of a municipality without the consent of the municipal authorities. We think that **where the State has not exercised its police power over the subject of fares upon street-railroads, the municipality and the street-railway may enter into contracts upon this subject that will be valid;** but the right of the municipality to refuse absolutely its consent to the construction of a street-railway within its limits and the constitutional and statutory provisions in

regard thereto, strengthen us in the view that **it is competent for the municipality and the street-railroad company to enter into contracts upon this subject.** ****

"The contracts with the municipalities of College Park and Decatur stand upon a different footing (from other alleged contracts). Those contracts were in existence on the 23rd day of August, 1907, and are still subsisting contracts. As we **decided** in the first part of this opinion, **these contracts are not invalid, but are valid and subsisting contracts and were valid and subsisting contracts on the 23rd day of August, 1907,** and the commission properly held that they were without jurisdiction to fix the fares between the two towns just referred to and the City of Atlanta over the lines of the railway company.

"Nothing that we have said in regard to the matter of contracts between municipalities and street-railway companies upon the subject of fares is to be construed as in any way impairing the police power of the State. We are of the opinion that at any time that the State may act in regard to this matter and extend the powers of the Railroad Commission so as to cover the matter of fares upon street-railways in towns where there are existing contracts, then regardless of such contracts, the commission, in the exercise of the branch of the power thus conferred, can act."

Georgia Railway & Power Co. vs. Railroad Commission of Georgia, 149 Ga. 1, 3, 4, 5, 6, 7, 9.

In the cases of Georgia Railway & Power Co. vs. Decatur and College Park, 152 Ga. 143 (being the judgment of the State Supreme Court upon writ of error from the interlocutory injunction in the present case), the Court, reviewing and adhering to the mandamus decision, again upheld the validity of the College Park contract, and in its opinion, among other things, said: "The right to fix rates on electric railway companies' lines is contained in the amendatory act of August 23, 1907 (Acts 1907, p. 72), **which carries into effect the provision of the constitution,** Art. 4, Sec. 2, Par. 1. *** **The effect of the constitutional provision and legislative enactment carrying it into effect was**

**clearly to cover the entire scheme of rate fixing.** If there existed, on August 23, 1907, a valid, subsisting contract which fixed the rate, **it was conclusive, and neither the Railroad Commission nor either party to the contract can change or alter it."**

## THE MANDAMUS JUDGMENT WAS PROPERLY ADHERED TO.

It was not improper for the State Supreme Court, in the present case, to adhere to the rulings in the mandamus case on the question of the validiy of the contract and the effect of the proviso of the Act of 1907. When the mandamus petition was filed in August 1918 (Record, pp. 58, 73, 122) the Power Company claimed that its rates were wholly inadequate and insufficient to furnish a sufficient income properly to care for and preserve its properties and adequately and efficiently serve the public; and so low as to be inadequate and insufficient to pay the cost of the service and yield a reasonable return on the investment necessary to render the service. (Record, pp. 67, 68). All questions raised in the present case, relative to the validity of the contract either were, or could have been, raised then, with the possible exception of the effect of the subsequent increase of fares on lines other than the Decatur and College Park line. In the mandamus case, the present defendant in error was a party by representation through the State Railroad Commission, appeared therein by counsel and assisted in the defense of same. (Record, p. 46).

The judgment in the mandamus case was conclusive between the parties and their privies as to all matters put in issue, or which under the rules of law might have been put in issue therein.

Park's Ann. Code of Ga., Vol. 3, Section 4336;

Souffront vs. La Compaignie Des Sucreries, 217 U. S. 475, 487; 54 L. ed. 846, 851;

National Subway Co. vs. St. Louis, 145 Mo. 551, 46 S. W. 981;

Board of Education vs. Cosgrove, 11 Ohio Cir. Ct. 163.

## THE HOLDINGS OF THE GEORGIA SUPREME COURT IN FAVOR OF THE VALIDITY OF THE CONTRACT, ARE SUBSTANTIAL IN CHARACTER, AND FIND AMPLE SUPPORT IN OTHER JURISDICTIONS.

The Georgia decisions, fully considered above, are not

isolated or peculiar to their own jurisdiction, on the question of the validity of the contract under review. Many decisions of various other States have the same or similar views with respect to the power of municipal corporations and public utilities to contract with reference to rates under constitutional or statutory consent clauses concerning the grant of the right to use and occupy streets, even in the absence of express power to contract relative to such subject matter. A few of these cases are here cited:

Muncie Natural Gas Co. vs. Muncie, 160 Ind. 97, 66 N. E. 436;

Shreveport Traction Co. vs. Shreveport, (La.) 47 So. 40;

Boerth vs. Detroit City Gas Co., 152 Mich. 654, 116 N. W. 628;

Quinby vs. Public Service Commission, 223 N. Y. 244, 119 N. E. 433; **reaffirmed** in Niagara Falls vs. Public Service Commission, 229 N. Y. 333, 128 N. E. 247;

Columbus vs. Public Utilities Commission, (Ohio Supreme Court), 133 N. E. 800, 805 (2), 806, 807, et seq., (exhaustively reviewing every phase of question);

Alleghany vs. Millvale, etc., Ry. Co., 159 Pa. 411, 28 Atl. 202;

Manitowoc vs. Manitowoc, etc., Traction Co., 145 Wis. 13, 19, 129 N. W. 925.

And the view of the Georgia Court that such a contract as to fares is valid and binding between the parties, that is, between the municipality and the utility, so long as and until the State, in the exercise of its police power, sees fit to act, likewise finds support in the authorities of other jurisdictions.

Westinghouse Electric Co. vs. Binghampton R. Co., 225 Fed. 378;

City of Emporia vs. Emporia Telephone Co., 88 Kan. 443, 129 Pac. 187;

Charleston, etc., Lighting Co. vs. Charleston, (S. C.) 75 S. E. 390;

Manitowoc vs. Manitowoc Traction Co., 145 Wis. 13, 129 N. W. 925.

**And see particularly** Milwaukee Electric Co. vs. Railroad Commission, 238 U. S. 174, 182, 184; 59 L. ed. 1254, 1260, 1261, **affirming** 153 Wis. 592, 142 N. W. 491; wherein this Court, though not bound to do so, followed the State court decision upon the meaning and operation of a state statute similar to the Georgia constitutional and statutory consent provisions, above mentioned; and quoted, with approval, from the Manitowoc case, as follows: "No specific authority having been conferred on the city to enter into the contract in question, the right of the state to interfere whenever the public weal demanded was not abrogated. **The contract remained valid between the parties** until such time **as the state saw fit** to exercise its paramount authority, and no longer. To this extent, and this extent only, is the contract before us a valid subsisting obligation. It would be unreasonable to hold that by enacting ** (the Wisconsin statutes), the state intended to surrender its governmental power of fixing rates. That power was only **suspended until such time as the state saw fit to act."**

Further, the Georgia statute, known as the Act of 1907, is not alone in exempting from the operation of the powers of a public utilities commission, contracts relative to rates.

Springfield Gas & Electric Co. vs. City of Springfield, (U. S.) 66 L. ed. 38;

Arkansas Natural Gas Co. vs. Arkansas Railroad Commission, No. 500, October Term, 1922, decided by this court March 19, 1923.

Minneapolis, etc., R. Co. vs. Menasha, (Wis.) 150 N. W. 411.

## THE STATE HAS NOT SEEN FIT TO EXERCISE ITS PARAMOUNT AUTHORITY OVER THE CONTRACT.

The mandamus case was decided by the State Supreme Court on March 15, 1919 (149 Ga. 2); the present suit was started in the lower State Court on October 18, 1920 (Record, p. 57), and judgment affirming the interlocutory injunction was rendered September 27, 1921. In July, 1919, there was introduced in the House of Representatives

of the General Assembly of Georgia a bill to limit the operation of the proviso of the Act of 1907, which as introduced, and as it was finally enacted (Ga. Laws, 1919, p. 94), did not affect the contract in question. However, after the bill passed the House, it was amended in the Senate in such manner that it would have affected the contract. This amendment, was disagreed to by the House, and the contract was unaffected by the change made by the Act of 1919. (Record, p. 27). In 1921, the General Assembly of Georgia, by Act approved August 16, 1921 (Ga. Laws, 1921, p. 111), relating to the incorporation and powers of interurban railroads operated by gas or electricity and the jurisdiction of the Railroad Commission over same, provided, among other things, as follows: "Provided, however, that nothing herein shall be construed to impair any valid, subsisting contract now in existence between any municipality and any railroad company or any street of interurban railroad or railway company, and provided this Act shall not operate as repeal of any existing municipal ordinance. And the Railroad Commission shall not have the power and authority under this Act to increase the fares on the lines of such companies which have heretofore been fixed by contract between such companies and any municipality."

This Act of 1921 was in force at the time of the hearing on the question of the grant of a permanent injunction in the lower state court (January 18, 1922), and also at the time of the amendment to the answer in said court (November 3, 1921), and yet it was not attacked by the defendants in the Court below then or at any other time, on any ground or in any way. The allegations of the original petition were broad enough to entitle the plaintiff below to its protection. The petition was for an injunction, which operates **in futuro.**

**Compare** Duplex Printing Press Co. vs. Deering, 254 U. S. 443, 464, 65 L. ed. 349, 355;

American Steel Foundries vs. Tri-City Council, (U. S.) 66 L. ed. 103, 108;

Texas Co. vs. Brown, (U. S.), 66 L. ed. 428.

## EFFECT OF FINDING IN FAVOR OF VALIDITY OF CONTRACT.

If this Court determines that there was and is a valid contract, either by following the State Court decisions, or by independent finding, then the question whether the rate is unremunerative or too low to give a reasonable return, is immaterial; and the plaintiffs in error cannot complain that the operation of the contract would take its property without due process of law, and deny it the equal protection of the laws, in violation of the 14th amendment to the Federal Constitution.

Paducah vs. Paducah R. Co., (U. S.) 67 L. ed. 284, 286, **citing** Southern Iowa Electric Co. vs. Chariton, 255 U. S. 539, 542; 65 L. ed. 764, 775; and San Antonio vs. San Antonio Pub. Serv. Co., 255 U. S. 547, 65 L. ed. 777.

## THE CONTRACT FALLS WITHIN THE OPERATION OF THE PROVISO OF THE ACT OF 1907, AND THAT ACT AND ITS PROVISO ARE NOT UNCONSTITUTIONAL.

The effect of the Act of 1907, which carried into effect a State constitutional provision, was clearly to cover the **entire** scheme of rate fixing.

Georgia Railway & Power Co. vs. Decatur, 152 Ga. 143, 149.

The classification made in the Act by its proviso was neither unreasonable nor arbitrary, and was clearly within the power of the State to enact, and does not violate the 14th amendment to the Federal Constitution. The proviso withstood an attack based on the equivalent State constitutional provisions (Record, p. 71) in the mandamus case. (149 Ga. 1.)

A long line of decisions by this Court has settled that, in the exercise of the police power, reasonable classification may be freely applied, and that regulation is not violative of the equal protection clause merely because it is **not all-embracing.**

Zucht vs. King, (U. S.) 67 L. ed. 28.

Any classification adopted by a state in the exercise of its police power which has a reasonable basis, and is, therefore, not arbitrary, will be sustained against an attack based upon the equal protection of the laws clause of

the 14th amendment; and every state of facts sufficient to sustain such classification which can be reasonably conceived of as having existed when the law was enacted will be assumed.

Crescent Cotton Oil Co. vs. Mississippi, (U. S.) 66 L. ed. 55, 58.

Thus classification of individuals and corporations; public-service and other corporations; and municipal and other corporations, have all been sustained.

Crescent Cotton Oil Co. vs. Mississippi, **supra;**

Prudential Ins. Co. vs. Cheek, (U. S.) 66 L. ed. 626;

Chicago, etc., R. Co. vs. Perry, (U. S.) 66 L. ed. 635;

Springfield Gas & Electric Co. vs. Springfield, (U. S.) 66 L. ed. 38.

See also Heisler vs. Thomas Colliery Co., (U. S.) 67 L. ed. 119;

Durham Public Serv. Co. vs. Durham (U. S.) 67 L. ed. 330, 332.

In the Springfield case, **supra,** it was held by this Court that leaving free in the matter of charges a municipality engaged in producing and selling electricity to private consumers, while making the rates of private electric companies subject to the approval of the state public utilities commission, as is done by Illinois statutes, all part of a single plan, does not deny to the private corporation the equal protection of the laws. The contention of the private corporation in that case was that the **exception of municipal corporations** from the Public Utilities Act was void, under the 14th amendment, and that the Act should be enforced as if the exception were not there.

In the case of Arkansas Natural Gas Co. vs. Arkansas Railroad Commission, No. 500, October Term, 1922, decided by this Court on March 19, 1923, this Court held that an Act of Arkansas transferring to the Railroad Commission jurisdiction theretofore possessed by the Corporation Commission, and providing that the Railroad Commission "shall have no jurisdiction or power to modify or impair any existing contracts for supplying gas", etc. (construed by the Court to except all proceedings pending before the Corporation Commission transferred to the Railroad Commission and not alone the three specified cases) did not

violate the 14th amendment. The Court said: "The presumption is that the action of the legislature—which applies alike to all falling within the class—was with full knowledge of the conditions and that no arbitrary selection of persons for subjection to the prescribed rule was intended. ** The state legislature is vested with a wide discretion in the matter and interference by this Court may not be had merely because its exercise has produced inequality—every selection of subjects or persons for governmental regulation does that—but only where it has produced an inequality which is actually and palpably unreasonable and arbitrary."

**ASSIGNMENTS OF ERROR AND THE RECORD.**

The foregoing would seem effectually to dispose of all of the Assignments of Error, except those numbered four, five and six, based upon the contract impairment clause of the Constitution. And this assumes that the Assignments of Error find basis in and are supported by the record. However, a comparison of the Assignments with the Federal questions raised or attempted to be raised by the pleadings, indicates some marked differences. Furthermore, none of the Assignments of Error based on the contract clause of the Constitution was made until after the judgment of the State Supreme Court on the first appeal, when they were set up, for the first time, in an amendment to the answer.

Assignments of error made for the purpose of bringing a case to the Federal Supreme Court cannot be looked to for the purpose of originating a right of review there. The right to review must be predicated on rulings concerning claims set up and denied in the State Court. Neither the petition for writ of error in the state court after judgment, nor the assignments of error in the Federal Supreme Court, nor the fact that the Chief Justice of the State Court allowed the writ, can supply deficiencies in the record of the State court, if such exist.

Appleby vs. Buffalo, 221 U. S. 524, 529; 55 L. ed. 838, 841;
Hulbert vs. Chicago, 202 U. S. 275, 50 L. ed. 1026.

And the final judgment of the highest court of a state

is not reviewable in the Federal Supreme Court as a decision in favor of the validity of a state statute challenged as repugnant to the Federal Constitution, where such question is not raised or specially set up in the trial court, and the appellate court does nothing more than decline to pass upon the Federal question because it is not raised in the trial court as required by the state practice.

Erie Railroad vs. Purdy, 185 U. S. 148, 46 L. ed. 847.

According to the state practice in Georgia, the State Supreme Court will not pass upon the constitutionality of a statute where the question is not raised in the trial court.

Palmer vs. Phinizy, 151 Ga. 589, 591.

And the question must be raised **and passed upon** by the trial court; it cannot be reviewed if made for the first time in the bill of exceptions from the trial court to the appellate court.

Patterson vs. Bank of Alapaha, 148 Ga. 356.

The clause of the constitution which it is claimed is violated, must be designated.

Atlanta vs. Standard Life Ins. Co., 149 Ga. 501.

And the law which it is contended is unconstitutional must be specified.

Gunn vs. Atwell, 148 Ga. 137.

In Georgia, it is an elementary rule of construction, as applied to a pleading, that it is to be construed most strongly against the pleader.

Krueger vs. MacDougald, 148 Ga. 429.

In this Court, it is firmly established that where a Federal question is raised on a second appeal and the State Court refuses to consider it, it comes too late.

Bonner vs. Gorman, 213 U. S. 86, 91; 53 L. ed. 709, 711.

Tested by the foregoing principles, how stand the Assignments of Error? They necessarily are to be limited by or contracted to the Federal questions timely and properly raised and passed upon in the State Courts. And the Federal questions may thus be considered by this court as they are raised in the pleadings in the trial court; assuming, of course, that they are included in the assignments.

**The Federal questions on the first appeal.** At the time of the first appeal, from the grant of the interlocutory injunction, the only Federal questions involved were those raised by the original answer and so-called cross-bill. The first appeal was decided September 27, 1921. The amendment to the answer was filed November 3, 1921. (Record, pp. 22, 201). As matter of fact, the answer and so-called cross-bill was nothing more than an answer. It is true there were prayers at the end of it, but they asked for no more relief than the defendant Companies would have been entitled to or would have received by a mere denial of the prayers of the plaintiff. However, on the first appeal, the State Supreme Court considered, in its opinion, the relief which the defendant Companies had asked.

The Federal questions, as made by the original answer, are set forth substantially on pages 7 to 11 of this Brief. They are as follows:

(a) That under **orders** of the Railroad Commission the service on the College Park line has been increased from six to twelve cars per hour, over a period of approximately fifteen years; that by an order of September 22, 1920, they were required, as early as practicable, and **if** the necessary equipment could be secured, within six months from October 1, 1920, to put on trailers during rush hours; that **if** the Commission has power to make the order, it is an order of the state, and is an order, which together with the **other orders,** makes the **additional service** confiscatory; and **if the law** gives the power to the Commission and the orders are valid, the 5 cent fare, **with the increased service,** will amount to confiscation and deny equal protection of the laws under the 14th amendment.

The conditional manner in which this question, or these questions, are raised, is enough to condemn it.

Palmer vs. Phinizy, 151 Ga. 589, 591.

The date and requirements of the **other orders** are not set forth; it does not appear that the trailer order was ever complied with; it was purely conditional; it is not alleged that any of the orders are valid; the issue as to their validity is evaded.

But overlooking all these defects, no Federal right has been violated.

The public have the right to demand efficient service, and the Railroad Commission is given full power to require that the Companies shall render efficient service.

Union Dry Goods Co. vs. Georgia Public Serv. Corp., 142 Ga. 841, 846.

See also City of Columbus vs. Public Utilities Com., (Ohio Supreme Court), 133 N. E. 800, 807.

And the mere requirement on the part of a Corporation Commission, affirmed by the highest State court, that a public utility render efficient service in carrying out its charter purposes, does not violate the 14th amendment.

Oklahoma Natural Gas Co. vs. Oklahoma, (U. S.) 66 L. ed. 331.

(b) That under the 14th amendment, the Railroad Commission cannot order increased service, where it has no authority to increase fares to pay for the increase and provide a reasonable return upon the value of the property used in performing **said service;** that in 1917 (over three years and a half before the suit was brought) the plaintiff requested the Railroad Commission to investigate traffic conditions, and a remedy for same in such way and manner as might seem just and right, both to the Company and to the public; and **if** petitioner undertook to have the Commission regulate service, it would be the action of **petitioner** which would cause a confiscation of defendants' property.

These allegations are mere conclusions, without substance, and easily disposed of by what has been said above. A mere aged request certainly could not amount to confiscation.

(c) That **if** the Act of 1907 is construed to authorize the Railroad Commission to require **increased service**, without the power to increase fares with reference to **such service**, the Act is confiscatory, unconstitutional, and void (the allegations are general); that **either** the Act **or** the construction is violative of the 14th amendment, because any act which deprives the Commission of the power to in-

crease the rate of fare, but grants it the power to increase service to such an extent that such increased service will require an income in excess of that produced by any rate of fare protected by the Act, would render the Act confiscatory; **and defendants attack said exception.** This is but another assignment relative to increased service. It is claimed that **either** the Act **or** the exception thereto is unconstitutional, but the exception only is attacked. It has already been seen that the exception or proviso of the Act is not violative of the 14th amendment. (Brief, pp. 36-38). The matter of increased service has already been fully answered. If the entire Act, and not merely the exception, had been attacked, and the whole Act had been declared invalid, the defendants would be no better off than they are now, for the Railroad Commission would be without jurisdiction, and the contract still good.

**Compare** Springfield Gas & Electric Co. vs. City of Springfield, (U. S.) 66 L. ed. 38.

(d) This Federal question relates to the matter of classification brought about by the proviso of the Act of 1907, and has already been considered above. (Brief, pp. 36-38). Probably the Assignment of Error with respect to this question (Record, pp. 6, 7, No. 3-a) should not be considered at all, because of the injection into it of the Act of 1919. This Act is nowhere referred to in the record.

(e) The Federal question here raised relates to the alleged confiscation which would result from operation under the contract; and has already been considered above, under the catch-line, "Effect of finding in favor of validity of contract".

In this connection, attention is called to the suggestion of plaintiffs in error that the Railroad Commission, in its order of September 22, 1920, expressly held that under the so-called contract provision the service with reference to College Park traffic is not fairly compensatory, and that such ruling was made with reference to the then existing service required by the commission. (Record, pp. 145, 149). This statement on the part of the Commission was **coram non judice.** The mandamus case had been decided on

March 15, 1919. It was beyond the jurisdiction of the Commission officially to say or rule anything about the effect of the operation of the College Park contract, at the time of this order. Furthermore, the order was made on an application of the Power Company, filed in the summer of 1920, for permission to increase fares on all lines, **except the College Park and North Decatur lines** to which, of course, these cities were not parties. There was, therefore, no binding finding.

In this connection, see Wadley So. R. Co. vs. State, 137 Ga. 497;

Wichita R., etc., Co. vs. Public Utilities Commission, (U. S.) 67 L. ed. 52, 56, 57.

(f) It should probably be noted here that in the original answer it was admitted (paragraph ten) that when the Power Company took charge of the Electric Company's system of street railway, and began to operate same, it kept in force the free transfer privilege to and from College Park, as had been afforded by the Electric Company, and that there had been no discontinuance of same (Record, pp. 45, 130), but that the Companies denied the authority of the Railroad Commission to require the issuance of transfers to the College Park traffic, and claimed that **they themselves** had the right, power and authority to discontinue same; and that they further alleged that the contentions made in the answer "with reference to illegal, discriminatory and unconstitutional rates with reference to College Park traffic also apply with reference to transfers demanded by and issued to such passengers." (Record, pp. 130, 131). These allegations are not only entirely too general, but refer to no specific order or orders relative to transfers, and even if they had done so, might properly be referred to the various state constitutional provisions invoked.

Layton vs. Missouri, 187 U. S. 356, 47 L. ed. 214.

See also authorities cited above to general principles regarding raising of constitutional questions.

**Federal questions raised by amendment to answer.** In

the amendment to the answer, which was filed after the interlocutory injunction had been granted and affirmed on the first appeal, plaintiffs in error raised for the first time questions under the contract clause of the Federal Constitution. (Record, pp. 195 to 200).

The judgment of the State Supreme Court on the second appeal in the present case having been decided on the doctrines of "law of the case" **and res adjudicata,** the Federal questions attempted to be raised in the amendment to the answer came too late.

Bonner vs. Gorman, **supra;** (Brief, p. 39).

Northern Pacific R. Co. vs. Ellis, 144 U. S. 458, 464; 36 L. ed. 504, 506;

Yazoo, etc., R. Co. vs. Adams, 180 U. S. 1, 6, 7, 8; 45 L. ed. 395.

Even if these questions had been raised in time, they were not in proper form. Plaintiffs in error at all times prior to this amendment contended that the rate provision was not a contract; and even in the assignments based on the contract clause of the constitution, they are careful not to make any direct admission or contention as to the existence of a contract, calling it an alleged contract or a claimed contract; and, in one instance, raising a question under the contract clause, **if** the court holds the contract valid. Furthermore, there is no positive allegation that the statutes mentioned impair the contract obligations; the questions are raised on possible constructions.

Palmer vs. Phinizy, 151 Ga. 589, 591.

**The Federal questions raised by amendment are without merit.** Even if the Federal questions attempted to be raised in the amendment to the answer had been timely and properly brought to the attention of the Court, they were without substantial merit. They all revolve around the matter of the construction of that provision of the franchise contract which relates to the territorial operation of the five cents fare, to wit, "from the southern limits of said City of College Park to some central point in the City of Atlanta". At the time the suit was brought the

distance from a central point in the City of Atlanta to the present northern limits of College Park (College Park is south of Atlanta) was 7.309 miles, and the length of the line of railway within the present limits of College Park, was 1.173 miles, which included 780 feet, or about one-sixth of a mile, which had been added to the territory of College Park on its northern side after the execution of the franchise contract in 1905, to wit, in 1906. (Original answer, Record, pp. 133, 137). The original answer first made the contention that the contract fixes fares not only within the municipal limits, but also over the entire College Park line which extended through the County and other municipalities outside of College Park, and was, therefore, **ultra vires,** contrary to public policy, illegal, unconstitutional and void. Then the inconsistent contention was made that it operated only from one point in the City of College Park, to wit, its southern limits, in only one direction, to wit, to Atlanta; that it did not operate from Atlanta to College Park, nor from any point in College Park, except the southern limits thereof, to Atlanta; and that it did not operate in the added territory of 780 feet. (Original answer, paragraphs 34, 36, 37; Record, pp. 134, 136). Thus, it will be seen, the construction of the provision, with respect to its territorial operation, was clearly involved in the first appeal. The answer and so-called cross-bill had not been stricken on demurrer at that time. The petition alleged that the proper construction of the provision was that it operated in both directions, and to and from any point in College Park, and that this construction had been placed upon it by the parties (Record, p. 45). One of the prayers of the petition was that the injunction prayed for should operate as against any increase of fares from Atlanta to College Park, and **vice versa.** (Record, p. 50). The injunction, both interlocutory and permanent, was granted, as prayed. It further appeared that the single track in College Park ended at one point, its southern terminus, and the double track at another; and that the southern terminus had never been extended to the extreme southern limits of College Park.

It further appeared that the Electric Company had waived its right to extend its tracks to the extreme southern limits of College Park, in favor of another Company; and that its southern terminus has always remained at the same point. (Record, pp. 30, 31, 32).

None of the Federal questions based on alleged impairment of contract, with respect to the territorial operation of the franchise contract, having been raised on the first appeal, the State Supreme Court, on that appeal, necessarily by judicial construction decided the question made as to the operation of the contract, in favor of its operation in both directions and to and from all points within the present limits of College Park. And it is insisted that this was the only reasonable and proper construction to be placed upon it; and one which this Court would recognize. See also the Mandamus case.

When there can be no pretense that the State Court adopted its view of the proper construction of a contract in order to evade a constitutional issue, and the case has been decided upon grounds that have no relation to any Federal question, the Federal Supreme Court accepts the decision, whether right or wrong.

Nickel vs. Cole, 256 U. S. 222, 225, 65 L. ed. 900, 905.

The Federal Supreme Court does not sit to revise the construction of documents by state courts.

Seattle, etc., R. Co. vs. Washington, 231 U. S. 568, 58 L. ed. 382.

The construction of the provision in the respect under consideration was by judicial action,—judicial decision. The contract clause of the Federal Constitution prohibits legislative, not judicial, action. Impairment of a contract by judicial decision does not raise a Federal question which can be reviewed by the Federal Supreme Court on writ of error to a state court.

Kryser vs. Wilson, 242 U. S. 171, 61 L. ed. 229;

McCoy vs. Union Elev. R. Co., 247 U. S. 354, 363; 62 L. ed. 1157, 1165, and cases cited.

So far as the Act of 1906 is concerned, it is an Act merely adding a strip of territory 780 feet in length or width to College Park. (Ga. Laws, 1906, p. 650). There is, of course, nothing in it about extending the effect of the franchise contract over the added territory. It cannot be the case that construction of this Act extends the rate provision over the territory added by it; the construction of the rate provision does that. And so with the Act of 1907. And if neither one of these Acts impairs the College Park contract, it is difficult to understand how they can impair the Fulton County contract which is claimed to cover the added territory; and certainly there can be no such thing as the impairment of the County contract by the College Park contract.

The effect of requirement of increase in quality or quantity of service has already been considered in another connection; and it is deemed necessary merely to refer to what was there said as fully answering the contention made with respect thereto in the amendment to the answer. (Brief, p. 41).

The validity of none of the orders of the Railroad Commission complained of, has been tested by resort to the safe, adequate and available remedy under Ga. Civil Code, 1911, Sec. 2625, so far as appears from the present record; on the other hand, plaintiffs in error have, more than once, invoked the jurisdiction of the Railroad Commission for increased rates, and with success, except as to the College Park and Decatur fare contracts; the Railroad Commission had jurisdiction with respect to the orders vaguely referred to as relied on, if the contract was held to be valid; and plaintiffs in error cannot be heard in the present proceeding with respect thereto.

**Compare** Wadley So. Ry. Co. vs. Georgia, 235 U. S. 651, 59 L. ed. 405, affirming 137 Ga. 497.

**PLAINTIFFS IN ERROR CANNOT SURRENDER CONTRACT AND CEASE OPERATION.**

In the original answer, the plaintiffs in error state: "If it be held by the court that defendants cannot terminate said contract provision, without at the same time giving up the right to operate its cars within the municipal limits

of College Park and giving up any right they may have under the other provisions of said so-called franchise contract, defendants say that they hereby surrender all rights they may have under and by virtue of said so-called contract franchise and ask the court to declare all their rights under and by virtue of said contract null and void and to relieve the defendants of operating said line within the limits of College Park and to permit defendants to take up their said tracks within the corporate limits of College Park. *** If the court should hold that said so-called contract provision is binding unless defendants abrogate the entire so-called franchise contract and terminate the entire contract defendants hereby offer to surrender the entire contract and cease to operate in or within petitioner's territorial limits."

(Record, p. 147).

The above language is in that portion of the so-called cross-bill, which if it were, in fact, a cross-bill, would be the stating or charging part thereof. Nothing like it is even hinted at in the formal prayers, or praying part, of the alleged cross-bill. They really pray only for the setting aside of the contract, with the retention of everything they acquired under it, and with the protection of a court of equity for their own rates, as and to be fixed by them.

There was no allegation of an offer to surrender the franchise before the suit was brought; there was legally no such offer pleaded in the suit. There was no issue in the case as to the right to surrender the franchise and cease operation .There was no occasion whatever to hold that the contract was not only valid, but could not be terminated or abrogated except by surrender of the franchise. No such question was raised by proper pleading. The allegations above set forth constituted nothing more than an offer to do something after the litigation had begun, on an issue, different in its nature from that forced by the plaintiffs in error and squarely met; and, indeed, only after that issue should have been determined in the litigation, and if it should be determined in a certain way.

But aside from the way in which the question is presented, there was no right on the part of the plaintiffs in error to surrender their franchise and cease operation of their cars. They had **agreed** in writing, in the acceptance of their franchise, to construct, electrically equip **and operate** the double track line of electric railway as provided by said ordinance. They could not surrender and cease to function. **They were bound by the contract to operate.** "If it is a valid, subsisting contract, the Power Company is bound by it." (152 Ga. 146).

In the case of Macon Railway & Light Co. vs. Corbin, et al., No. 3011, in the Supreme Court of Georgia, decided February 28, 1923, rehearing denied March 3, 1923, it appeared that the Macon Railway & Light Company, a corporation chartered by the Secretary of State, with power to construct and operate an electric railway, desiring to extend its line of railway to points beyond the limits of the City of Macon, applied to the Board of Commissioners of Bibb County for the right to construct its railroad over and along portions of certain public roads. The Board, in regular session, passed a resolution which, so far as material to be stated, was as follows: "Ordered: That the consent and permission of this Board be and the same is hereby granted to said Macon Railway & Light Company to use the following described public roads (describing them). The consent and permission hereby granted ** are subject to all laws now of force, or that may hereafter become of force, applicable to the matter; and are granted subject to the following terms, conditions and stipulations, to wit: *** 5th. That said Railway & Light Company, its successors and assigns, shall, in the operation of said street railroad, maintain a schedule of not more than thirty minutes between cars, running each way. 6th. That this grant shall be void and of no effect, unless said company shall for itself, its successors and assigns, accept and agree to the terms, conditions and stipulations of the same; such acceptance and agreement to be in writing and entered upon the minutes of this Board, along with this order, as a part thereof."

In compliance with the terms of the foregoing resolution, the Macon Railway & Light Company accepted in writing the franchise, and proceeded thereafter to exercise the grant; it constructed its line over the specified portions of the public roads and thereafter operated its cars over its extended line of railroad in its usual service of the public. After the line had been operated for a number of years, the Company determined to abandon a portion of it on the ground that its operation was unprofitable and could only be run at a loss. It ceased operation on such portion, and commenced to dismantle its tracks, when certain citizens of Bibb County, who had made investments and built houses along its line, and who were interested in the continued operation thereof, filed a petition in equity to enjoin the Company from dismantling and taking up its line of railway.

The Court, after holding that the plaintiffs had such an interest in the matter as would authorize them to file a petition for injunction, held that the grant of the right to the street-railway company to construct its line of railway over the specified portions of the public roads of Bibb County, upon the terms and conditions expressed in the resolution, and the acceptance thereof in writing by the street-railway company, constituted a valid contract, **binding the street-railway company to operate said railway according to the terms mentioned in said resolution.**

We apprehend that the question of the right of the street-railway company to surrender its franchise and cease operation is one of local law, with which this Court will not concern itself.

**INTERVENORS TOOK CASE AS THEY FOUND IT.**

Even if the Assignments of Error relating to alleged Federal rights of the intervenors could be considered in the absence of the intervention and demurrer thereto from the Transcript of Record (Brief, pp. 15, 16), they took the case as they found it, and, having cast their fortunes with the defendants in that case, they must stand or fall with them.

Love vs. Goodson, 150 Ga. 46.

Furthermore, the operation of the contract did not, as a matter of fact, discriminate against the intervenors. They were entitled to its benefits, along with the rest of the public. Its operation was not limited to **residents** of College Park.

That its operation did not amount to illegal discrimination, under State law, was settled by the mandamus case, and the decisions in the present case.

See also Wadley So. R. Co. vs. State, 137 Ga. 497, 509;

Forman vs. New Orleans, etc., R. Co., 40 La. Ann. 446, 4 So. 246.

Being a contract, it did not violate the equal protection of the laws clause of the 14th amendment of the Federal Constitution.

Paducah vs. Paducah R. Co., (U. S.) 67 L. ed. 284, 286

**THE PETITION FOR WRIT OF CERTIORARI IN THIS CASE SHOULD BE DENIED.**

Where a writ of error lies from the Federal Supreme Court to a state court, a petition for certiorari that was presented for greater caution, will be denied.

Gillespie vs. Oklahoma, (U. S.) 66 L. ed. 211.

Respectfully submitted,

GEO. P. WHITMAN,

Attorney for Defendant in Error, and Respondent in Certiorari.

Supreme Court, U.S.
FILED
MAR 23 1923
WM. R. STANSBURY

# Supreme Court Of The United States

## October Term 1922

## No. 464

GEORGIA RAILWAY AND POWER COMPANY et al., Plaintiffs in Error and Petitioners in Certiorari,

vs.

THE MAYOR AND COUNCIL OF THE CITY OF COLLEGE PARK, Defendants in Error and Respondents in Certiorari.

**FROM THE SUPREME COURT OF THE STATE OF GEORGIA.**

**Brief for Plaintiffs in Error and Petitioners in Certiorari.**

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WALTER T. COLQUITT,
Attorneys for Plaintiffs in Error and Petitioners in Certiorari.

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**IN THE**
**SUPREME COURT OF THE UNITED STATES**

GEORGIA RAILWAY & POWER COMPANY,
GEORGIA RAILWAY & ELECTRIC COMPANY,
J. D. Malsby, J. R. Hardin, F. McDonald, Jr.,
C. M. Binder, J. C. Gorman, A. L. Curtis,
J. E. Phillips, J. H. Glenn, P. L. Provabo,
H. L. Gloer, F. D. Hadley, B. T. Simpson,
J. L. Murphy, D. N. Baldwin, C. E. Bennett,
W. E. Flowers, H. L. Willis, T. F. Johnson,
W. E. Field, R. L. Walker, C. C. Barfield,
M. W. Hawn, P. E. Davis and C. Roessler,
Plaintiffs in Error
and
Petitioners in Certiorari,

vs.

THE MAYOR AND COUNCIL OF THE CITY OF COLLEGE PARK,
Defendant in Error
and
Respondent in Certiorari.

No. 464

October Term 1922

## STATEMENT OF CASE.

The Mayor and General Council of the City of College Park (herein called the municipality) brought an equitable petition against the Georgia Railway & Power Company (herein called the power company) individually, and as lessor of the Georgia Railway & Electric Company (herein called the electric company).

This case was based upon claimed contract which plaintiff contends fixes a 5 cents rate of fare; and that said claimed contract, together with subsequent orders of the Railroad Commission of Georgia, requires the operating street railway company to transport passengers boarding or alighting from cars within the **present** limits of the City of College

Park to and from Atlanta, with the right of transfers whereby such passengers may ride over all the lines of the street railway for a 5 cents fare; although, under the rates fixed by the Georgia Railroad Commission all other passengers are required to pay a fare of 7 cents, (except passengers on the main Decatur line, discussed in case No. 463).

## THE ALLEGATIONS OF THE AMENDED PETITION.

On November 6th, 1905, the municipality granted to the electric company, its successors and assigns, "the right..... to convert its present single track ..... within the limits of College Park into a double track line of electric railway". Section 2 of this ordinance provided "That no greater fare than that of 5 cents for each passenger be charged for passage from the southern limits of said City of College Park to some central point in the City of Atlanta". (Record p. 53-54.)

This provision was alleged to be a valid binding contract, fixing perpetually 5 cents fare, made operative by the order of the Railroad Commission of Georgia from Atlanta to College Park, as well as from the southern limits of College Park to some central point in the City of Atlanta. Said order of the Commission was as follows: "All rates effective in this State ..... shall apply in either direction, over the same line between the same points". (Record p. 150, par 50. Record p. 152, Exhibit 1.)

Prior to 1918 the electric company, and thereafter the power company, charged a 5 cents fare, together with transfers without additional cost, over all its lines. (Record p. 45.)

In 1918 the power company made application to the Railroad Commission of Georgia to be permitted a charge of 6

cents fare, with 2 cents for transfers. On August 14th, 1918, the said Commission held that it lacked jurisdiction to grant the relief asked; that the Georgia Act of 1907, which put street railroads under the jurisdiction of the Commission, was limited by the following proviso:

> "Provided, however, that nothing herein shall be construed to impair any valid, subsisting contract now in existence between any municipality and any such company, and provided that this act shall not operate as a repeal of any existing municipal ordinance."

(Record page 179:)

The Commission, in construing this proviso, held:

> "The physical existence of a contact in 1907 between the Town of Decatur and the lessor of applicant, prescribing a 5 cents maximum fare between Decatur and Atlanta is admitted. A similar contract between College Park and applicant's lessor was in existence. . . . ."
>
> The question as to whether the contracts physically existent were or are valid contracts is not for us to decide. . . . ."
>
> Our view is that when in dealing or considering dealing with the rates of a street railroad, under the terms of the Act of 1907, we come face to face with a contract or an ordinance, in existence on August 23rd, 1907, still subsisting, we are estopped until such obstacle is removed in a legal procedure before a court of competent jurisdiction, or the General Assembly further acts."

(Record p. 179-180:)

In this same order the Commission held that in its opinion the applicant was entitled to an increase in its street car

fares, and that a fare of 6 cents would be reasonable and just, and made this recommendation to the City authorities:

> "This Commission believes that applicant is entitled to an increase in its street car fares, and that a 6 cents fare would be reasonable and just, so long as existing abnormal war conditions prevail, and the justice of granting such increases by amendment to existing contracts and ordinances, is earnestly urged upon the Councilmanic authorities of Atlanta, Decatur, and College Park, with the assurance on the part of this Commission that simultaneously with the effective date of such amendment, similar provisions will be made by it as to fares in territory not included in the municipalties mentioned."

(Record page 181:)

On the 23rd of August, 1918, the power company brought mandamus against the Railroad Commission, and the individual commissioners, to assume jurisdiction under the Act of 1907, and fix fares under the pending application. The Supreme Court (149 Ga. 1) overruled the Commission, holding that the Commission, except as to College Park and one Decatur line, had jurisdiction to fix the fares of the power company, holding that the College Park and the Decatur line were protected by contracts falling within the proviso of said Act.

Subsequent to said decision, on April 2nd, 1919, the Commission fixed for the power company a fare of 6 cents, except where fares were protected by contract with the City of Decatur and College Park. (Record p. 56, Exhibit D.)

On April 15th, 1919, the power company applied to the Commission for a discontinuance of free transfers to College Park passengers, contending that the claimed contract did

not provide for free transfers, and that to do so was unjust and discriminatory and added to the burdens of the claimed contract. The petition was denied, and the power company required to continue free transfers to College Park patrons. (Record p. 46-47, par. 18.)

Subsequent thereto (September 22nd, 1920) the Commission fixed 7 cents fare, except as prohibited by contracts with Decatur and College Park. (Record p. 47, par 19.)

On October 5th, 1920, both the electric and power company notified the municipality in writing, denying the validity of said claimed contract, and specifically notified it that on and after October 20th, 1920, the fare provision of the ordinance of November 6th, 1906, would be terminated. (Record p. 47, par. 20; p. 57, Exhibit E.)

This notice caused the present suit, praying that both the electric and power company be perpetually enjoined (a) in charging a higher fare than 5 cents from any part of College Park to Atlanta, and also from Atlanta to College Park; (b) from discontinuing giving free transfers with the 5 cents fare; (c) from changing the quality and quantity of the service ordered by the Commission (Record p. 50-52); (d) from violating any of the orders and rules of the Railroad Commission as set out in the petition as amended.

(Record p. 151.)

## ANSWERS AND CROSS BILLS

## of

## ELECTRIC AND POWER COMPANIES

## and of

## NUMEROUS INDIVIDUAL PATRONS OF THE STREET RAILWAY COMPANIES.

Both the electric company and the power company filed original and amended answers and cross bills. (Record p. 128-150 and 195-200.)

Approximately 50 street car patrons (herein called intervenors) living on and daily using the College Park line between the northern boundary of College Park and the City of Atlanta, were made by the Court's order defendants in said case, and filed answers and cross bills, wherein they adopted the allegations of the answers and cross bills of the railway companies.

These answers and cross bills alleged substantially as follows:

The power company, with 212 miles of single track, 157 miles of which is within the City of Atlanta, furnishes railway transportation to Atlanta and its vicinity.

The College Park line runs from Atlanta to College Park, beginning in Atlanta, at the corner of Broad and Alabama Streets, thence over various Atlanta Streets to the corporate limits of Atlanta, 4.576 miles, thence along the streets of the town of East Point (a separate municipality), thence along a public road of Fulton County 2.474 miles, to present northern limits of College Park, 7.309 from the starting point, thence along the streets of College Park 1.173 miles, making a total length of 8.48 miles, only 1.73 miles being located within the present limits of College Park.

At the time of the mandamus decision supra (149 Ga. 1) the power company charged over all its lines the uniform rate of 5 cents, with free transfers. Subsequently, and under the order of the Commission of April 2nd, 1919, that company charged a 6 cents fare until the Commission's order of September 22nd, 1920, when thereafter it charged a 7 cents fare, save to College Park traffic and Decatur traffic riding on main Decatur line. (Record 149, Exhibit A.)

Thus the State of Georgia, through its Railroad Commission, fixed a rate of 7 cents for all passengers on the College Park line, except as to passengers boarding or leaving the car within the limits of College Park a 5 cents fare was permitted.

The Commission, discussing the College Park 5 cents fare in its order of September 22nd, 1920, said:

> "The 5 cents fare now in effect on the Main Decatur and College Park lines, contracted for under vastly different conditions than now exist, are not fairly compensatory, and as to the patrons of the company on other routes, and on intermediate territory on these routes are discriminatory. The Commission is without authority to increase them."

(Record page 149, Exhibit A:)

Thereafter both the electric and power company, on the 5th of October, 1920, served the municipality with the following written notice:

> "TO THE MAYOR AND COUNCIL OF THE CITY OF COLLEGE PARK AND THE CITY OF COLLEGE PARK:
>
> You are hereby notified that on and after the 20th day of October, 1920, the fare to and from and between

Atlanta and College Park, on the line operated by the Georgia Railway & Power Company, will be at the rate of seven (7) cents.

Denying the validity or legality of any so-called contract provision limiting the fare to five (5) cents from the southern limits of the City of College Park to some central point in the City of Atlanta, set out in the ordinance of the Mayor and Council of the City of College Park of November 6, 1905, you are notified that if the provision with reference to fare was binding at any time, it is not now binding or legal and is hereby terminated from and after the above named date.

This 5th day of October, 1920."

(Record p. 57, Exhibit E:)

To permit College Park patrons, by virtue of the continuance of the rate ordinance of November 6th, 1905, to pay only a 5 cents fare over the whole railway system, while other patrons, by the action of the State, are required to pay 7 cents, would be unjust and discriminatory against all other municipalities, and all individual patrons, except the patrons from College Park, and would force the power company to violate the State Constitution against discrimination.

The effect of this College Park 5 cents fare, and 7 cents fare all elsewhere, is to establish on the same line, on the same cars, two separate and distinct fares, the smaller fare being charged for the longer haul and the greater service, and the larger fare for the shorter haul and less service.

Two such rates of fare over the same line, affecting the whole power railroad system, as to other municipalities, the intervenors and all other passengers, save only the College

Park patrons, violates the fourteenth amendment of the Constitution of the United States, in that it denies to them the equal protection of the laws as therein guaranteed.

As against the existence and validity of the 5 cents fare both the railway companies and the intervenors contended:

FIRST.

(a) Neither the municipality, nor the railway companies have power to make binding fare contracts;

(b) Said parties are prohibited from making contracts for fixed fares, irrevocable and unlimited as to time, under the Constitution of the State of Georgia, as set out in Sections 6389, 6464, 6467 and 6563 of the Code of 1914.

SECOND.

If said fare provision had ever been a contract it had been terminated prior to the present suit.

(a) By the complete performance;

(b) By adequate notice of its termination;

(c) By action of the State of Georgia, through the Commission, rendering compliance with said 5 cents fare discriminatory and confiscatory; (1) by requiring the giving of free transfers; and (2) by increasing the quality and quantity of the service over and above that provided for in the claimed contract;

(d) By Legislative Act of the State of Georgia (Georgia laws 1906, page 650) extending the territorial limits of the 5 cents fare provision, by extension of the corporate limits of College Park.

If said Act of the State of Georgia, and said orders of the Railroad Commission (c, d supra) are legally valid, they, themselves, terminated the claimed fare provision of November 6th, 1905, or justified its termination by the railway companies, or required the Court to declare it terminated in the present procedings.

As a result of said Act and orders, the cost of College Park traffic was 13.957 cents per passenger (without regard to any return upon its property), and the compliance therewith made the 5 cents fare discriminatory, confiscatory, and violative of the fourteenth amendment of the Constitution of the United States.

If said fare provision is still a subsisting, valid and binding contract, then various legislative acts and acts of the State of Georgia, through its Railroad Commission, are illegal and unconstitutional, violating Article 1, Section 10, of the Constitution of the United States, in that said State Actions impaired the obligation of said contract by placing increased burdens upon the railway companies, not provided for and set out in said contracts.

The actions of the State thus attacked were as follows:

(a) The order of the Railroad Commission as follows:

> "All rates effective in this State, except in cases otherwise specified, shall apply in either direction over the same line, betwen the same points."

The claimed contract applied to passengers en route from the southern limits of College Park to some central point in the City of Atlanta.

By said Commission's order claimed contract was enlarged so as to include passengers from Atlanta to College

Park, and all parts of College Park to the City of Atlanta (Record p. 152, Exhibit I, p. 150-152).

(b) The orders of the Railroad Commission adding free transfers to the 5 cents fare provision, thereby increasing the obligation of the contract. (Record p. 56, 46, par. 18.)

(c) The order of the Railroad Commission of September 22nd, 1920, requiring an increase in quality and quantity of service to College Park patrons over and above that provided for in the contract. (Record p. 149, Exhibit A.)

(d) The Act of the Assembly of Georgia of 1906, page 650, extending northward the incorporate limits of the City of College Park, if construed by the Courts as increasing the territory in which said 5 cents fare was effective.

Prior to the passage of said Act the railways had, under contract with the County of Fulton, constructed a part of its line from College Park to Atlanta upon the then public road of the County, without any contract as to fares. Upon the passage of said Act said public road became a part of the streets of College Park, and if the 5 cents fare was extended by the Court's construction of the Act to include that part of the line theretofore built under contract with the County of Fulton, the said Act thereby impaired the obligation of that contract, contrary to Article 1, Section 10, of the Constitution of the United States.

The Legislative Act of 1907, page 73 et seq., amended by the Acts of 1919 (Georgia laws 1919, page 94) as construed and enforced by the highest State Court, renders said Act unconstitutional and in violation of the fourteenth amendment of the Constitution of the United States, for as so construed said Act permitted the Railroad Commission to change all contract rate of fares between street railroad companies and private parties whenever made, all contract

rates between street railway companies and municipalities subsequent to 1907, all fare contracts between street railway companies and municipalities prior or subsequent to 1907 where the street railway company has its principal office and operates lines of railroads in Counties having a population of not less than 75,000 or more than 125,000, excluding only from the jurisdiction of the Commission rate contracts with municipalities in Counties having a population under 75,000 or over 125,000, of date prior to August 23rd, 1907.

The said Acts and amendments so construed fixed a discriminatory, illegal, and an unreasonable classified scheme of rates, and deny the street railroad companies, its individual patrons, and the municipalities of Georgia the equal protection of the laws guaranteed by the Fourteenth Amendment of the Constitution of the United States.

If the orders of the Commission above referred to are held by the Court to be valid and legal, then the Act of August 23rd, 1907 (Acts of 1907, page 73, et seq.), as thus construed and enforced empowers the Commission, as to College Park traffic, to render its cost confiscatory, while withholding from the Commission the power to fix reasonable rates therefor, thereby confiscating property of street railroad company, and denying it the equal protection of the law guaranted by the Fourtenth Amendment of the Constitution of the United States.

The cost of operating a line within the present limits of College Park amounted to 13.957 cents per passenger, said amount being now and for all future times confiscatory, not paying half of the operating expenses, without any return for the service rendered.

To compel such operation is in violation of the Fourteenth Amendment of the Constitution of the United States in that

it confiscates the property of the street railway companies and denies them the equal protection of the law.

The railroad companies asked for a decree, if the claimed rate provision was still in force and effect, permitting them to terminate all rights under the ordinance of November 6th, 1905, and that they be permitted to cease all operation of the street railway lines within the limits of College Park, and in connection therewith the intevenors contended that if the deficiency in the College Park fares be indirectly transferred to them by the Commission, increasing the fare they must pay, then they would be deprived of their property in violation of the Fourteenth Amendment of the Constitution of the United States. The prayers in answers and cross bills were in accordance with allegations thereunder.

## RULINGS OF THE COURT.

The Superior Court of Fulton County granted the municipalities a temporary restraining order, it was affirmed by the Supreme Court on writ of error. (Records p. 13-17) (152 Ga. 143-148.)

Thereafter the Judge of the Court, on general demurrer, struck the amended answers and cross bills of both the railway companies and the intevenors (Record p. 204), and then directed a verdict for and rendered final decree in favor of the municipality, granting all the prayers of the petition, and permanently enjoining the railway companies as prayed for in the petition as amended. (Record p. 204.)

These judgments on the demurrer, direction of the verdict, and the granting of the decree were by writ of error appealed to the Supreme Court of Georgia, and there affirmed. (Record 18-21, and 24-43) (153 Ga. 329-335).

## EFFECT OF JUDGMENT ON DEMURRER AND DECREE.

The effect of the judgment sustaining the demurrer, directing a verdict and rendering a decree was: (a) to hold the 5 cents fare contract still in force; (b) extend its operation to that part of the line subsequently taken into the present territorial limits of College Park; (c) to uphold and compel performance of the subsequent Legislative Acts and orders of the Commission, as against the attacks made upon them in the answers and cross bills as amended; (d) to deny the railway companies the right to terminate the claimed fare contract, or the right to discontinue the operation of their lines within College Park.

## JUDGMENT SUSTAINING GENERAL DEMURRER TO ANSWERS AND CROSS BILLS.

The various rulings, judgments and decrees of the State Court are brought to this Court for review, both by writ of error and petition for certiorari. The granting of the general demurrer to the answers and cross bills as amended is an admission of the truthfulness of all the facts therein set out.

## SPECIFICATION OF ERRORS RAISED AND RELIED UPON.

The assignments of error brought to this Court for review are:

(1) Under the undisputed facts in the case, forced compliance with the ordinance of the Mayor and Council of the City of College Park of November 6, 1905, to-wit:

> "That no greater fare than that of five cents for each passenger be charged for passage from the southern

limits of the City of College Park to some central point in the City of Atlanta,"

confiscates the property of the Georgia Railway & Electric Company and the Georgia Railway & Power Co.

(a) The State Court erred in not holding said provision unconstitutional as violative of the Fourteenth Amendment to the Constitution of the United States.

(b) The State Court erred in holding that said provision constituted a contract between the Mayor and Council of the City of College Park and the Georgia Railway & Electric Company and the Georgia Railway & Power Company, because: (1) Neither of said parties had any right, power or authority to make binding contracts as to fares; (2) said parties are prohibited from making contracts for fixed fares irrevocable and unlimited as to time, by the Constitution of the State of Georgia as set out in Sections 6389, 6464, 6467 and 6563 of the Code of 1914 of said State.

(c) Said State Court erred in not holding that if said provision was ever a contract; (1) it had ended prior to the pending suit; (a) by complete performance; (b) by adequate notice of its termination; (c) by the action of the State of Georgia, through the Commission, by which further forced compliance with said five cents fare rate provision was rendered discriminatory and, therefore, illegal and confiscatory; (d) by the action of the State of Georgia, through orders of the Railroad Commission, requiring the giving of transfers on payment of said five cents fare (thus entitling College Park passengers to ride over the entire street railway system for five cents, while other passengers, on the same line and for less identical character of service, are required to pay seven cents), and by orders of said body increasing the quality of service over and above

that provided for in the claimed contract; (e) by the legislative acts of the State of Georgia (Georgia Acts 1906, page 650) extending the territorial extent of the said five cents fare provision by extending the corporate limits of the City of College Park.

The State Court held that all of said orders and acts of the State were and are legal, valid and binding, and forced compliance therewith. This said construction by the Court of the ordinance of November 6, 1905, together with the forced compliance by said railway companies with said orders and acts of the State aforesaid, render the rate provision of said ordinance invalid and violative of the Fourteenth Amendment of the Constitution of the United States, in that it confiscated the property of plaintiffs in error and denied to them the equal protection of the law guaranteed therein.

2. Under the undisputed facts in the case, forced compliance with said ordinance of November 6, 1905, to-wit:

"That no greater fare than that of five cents for each passenger be charged for passage from the southern limits of said City of College Park to some central point in the City of Atlanta,"

violates the Fourteenth Amendment to the Constitution of the United States as to the individual intervenors in said case, in that it denies to them and all other citizens and patrons, than those leaving or boarding the cars of the stret railway companies in the City of College Park, the equal protection of the law as therein guaranteed; for that said provision of said ordinance, and the action of the State of Georgia by and through the Railroad Commission of said State, and construction placed upon same by the State court, required the original intervenors and all other citizens, persons and patrons (except College Park patrons), to pay seven cents for the same or less service,

while College Park patrons, for a similar or greater service, are charged only five cents.

3. Because the legislative act of the State of Georgia (Acts of 1907, page 73, et seq.), as construed and enforced by the State Court, and amended by the Act of August 18, 1919 (Georgia Laws 1919, page 94),

(a) Renders said act unconstitutional and violative of the Fourtenth Amendment to the Constitution of the United States in that it denies the plaintiffs in error, individually and collectively, the equal protection of the law and fixes a discriminatory and illegal scheme of rates, in that said act places under the jurisdiction of the Railroad Commission of Georgia the right, power and authority to change rates of fare fixed in all contracts except valid, subsisting contracts in existence on August 23, 1907, between any municipality and any street railway company having its principal office and operating lines of railroad in Counties having a population of less than 75,000 and more than 125,000. There is no legal or reasonable classification with reference to the contracts excepted and those placed under said Commission's jurisdiction; and as a result of said discriminatory exception, the individual plaintiffs in error and all other patrons of the street railway companies except those boarding or alighting from cars in College Park, are required to pay seven cents fare, while those boarding or alighting from cars in College Park pay only a five cents fare.

(b) Said act of 1907 (Georgia Acts 1907, page 73, et seq.) as construed and enforced by the Court, violates the Fourteenth Amendment to the Constitution of the United States, in that the Court holds that the said act withholds from the Railroad Commission of Georgia the right, power or authority to change the five cents fare provision of said ordinance of November 6th,

1905 (as set out in assignment of error No. 1), but holds that said Act confers jurisdiction upon said Commission to increase the quality and quantity of service rendered, and empowers the said Commission to require the issuing of transfers upon payment of the fare provided for in said ordinance; and said Act thus construed and enforced, confiscates the property of the Georgia Railway & Electric Company and the Georgia Railway & Power Company without due process of law, and denies them the equal protection of the law, in contravention of the Fourteenth Amendment to the Constitution of the United States.

(c) Said Act of 1907 (Acts 1907, page 73 et seq.), as construed and enforced by the Court against the individual intervenors, plaintiffs in error, fixes an illegal and discriminatory scheme of rates, in violation of the Fourteenth Amendment to the Constitution of the United States, in that the Court holds that under and by virtue of said Act, power and authority are conferred upon the Railroad Commission of Georgia to fix a seven cents rate of fare for less or similar service rendered to the individual intervenors and other persons and patrons similarly situated, while it maintains and keeps in force a five cents rate of fare for a greater or similar service rendered College Park patrons by the same street railway companies operating the same system and over the same lines.

(4) The State Court having held that the provisions of the ordinance of November 6, 1905, of the Mayor and Council of the City of College Park, to-wit:

"That no greater fare than that of five cents for each passenger be charged for passage from the southern limits of said City of College Park to some central point in the City of Atlanta,"

is a binding contract between the Mayor and Council

of the City of College Park and the Georgia Railway & Electric Company and the Georgia Railway & Power Company, the Court erred in not holding that the legislative act of the State of Georgia, of 1907 (Acts 1907, page 73 et seq.), as construed by the Court, violates Article 1, Section 10, of the Constitution of the United States, in that said Act as thus construed impairs the obligation of the said contract by increasing its burdens; in that the Court held that under the Act of 1907 the State Railroad Commission had the jurisdiction and power: (a) to require, and did require, the issuance of transfers on payment of the five cents contract fare, thereby entitling passengers to ride, not only to some central point in the City of Atlanta, but over the entire railway system in Atlanta and vicinity; and (b) to increase the quality and quantity of service rendered for said five cents fare. The Court erred in not holding that said Act and the orders of the Railroad Commission issued thereunder were unconstitutional and in violation of Article 1, Section 10, of the Constitution of the United States, in that they impair the obligation of the contract upheld by the Court.

(5) Under the provisions of the ordinance of the Mayor and Council of the City of College Park of November 6, 1905, to-wit:

"No greater fare than that of five cents for each passenger be charged for passage from the southern limits of said City of College Park to some central point in the City of Atlanta,"

held by the State Court to be a contract, a five cents rate of fare is provided for only "from the southern limits of said City of College Park to some central point in the City of Atlanta". The Court held that the legislative act of the State of Georgia (Acts 1907, page 73 et seq.), and the orders of the Commission under and by virtue of the said Act, made said five cents fare pro-

vision operative from other points in the City of College Park to other points in the City of Atlanta, and from Atlanta to College Park. Such construction placed upon said Act and orders impairs the obligations of said contract, in violation of Article 1, Section 10, of the Constitution of the United States, in that it places increased burdens upon plaintiffs in error, not provided for and set out in said contract, and the Court erred in not holding said Acts and orders unconstitutional.

(6) Because the State Court, having held that the fare provisions in the ordinance of November 6, 1905, as set out in assignment of error No. 1, constituted a a contract, erred in not holding that the Act of the General Assembly of the State of Georgia (Acts 1906, page 650) violates Article 1, Section 10, of the Constitution of the United States.

(a)

In that it impairs the obligations of said contract, for that said Act, as construed by the Court, extended the five cents provision of said contract to territory added to the City of College Park after the execution of said contract and extended its provisions to territory not included therein at the time the contract was executed.

(b)

Because the undisputed facts show that the County of Fulton entered into a contract with the Georgia Railway & Electric Company and the Georgia Railway & Power Company, under and by virtue of which contract the tracks of said street railway companies were placed in the public roads of the County of Fulton, between the City of Atlanta and the City of College Park, and by said contract fares to be charged passengers boarding the cars therein were not limited to five

cents. The construction placed by the Court upon said legislative act of 1906 required the street railway company to charge only five cents fares to passengers boarding and alighting from the cars within said territory, and said Act, thus construed, impairs the obligations of said contract, adding additional burdens thereto, and the Court erred in not holding said Act unconstitutional, in violation of Article 1, Section 10, of the Constitution of the United States; for that under said Act and said construction there is imposed a five cents fare for passengers boarding and alighting from cars in said former County territory.

(7) The ordinance of November 6, 1905, as set out in assignment of error No. 1, and as construed by the State Court, makes said ordinance violative of the Fourteenth Amendment to the Constitution of the United States, for that it denies to plaintiffs in error the equal protection of the laws guaranteed to them by the Fourteenth Amendment to the Constitution of the United States, for that the five cents fare provision therein contained is, by the undisputed facts, confiscatory; and to compel the Georgia Railway & Electric Company and the Georgia Railway & Power Company to continue to operate under and by virtue of the same, and denying them the right to terminate all its lines under and by virtue of said contract and to cease to operate its street railway lines within the City of College Park, and to compel said street railway companies to permanently devote their property to a public use, without any compensation therefor, and to compel them to continue public service in said territory, without reference to the value of the service rendered, thus confiscates the property of said companies.

(See Record pages 5-9.)

## MAIN CONTENTION OF MUNICIPALITY.

The municipality's case was predicated upon its contention that a valid binding rate contract existed at the time of the institution of its suit. If such contention is not sustained a reversal will necessarily follow.

Central Power Co. vs. City of Kearney, 274 Fed. 253;
Knoxville Gas Co. vs. City of Knoxville, 261 Fed. 284 (6);

Raleigh & Gaston Rd. Co. vs. Swanson, 102 Ga. 754.

## CONTENTIONS OF RAILWAY COMPANIES AND INTERVENORS.

The railway companies and the intervenors contend: (1) that the rate provision of the ordinance of November 6th, 1905, was not a binding contract at the time of the institution of this suit; (2) that if the rate provision of the ordinance is held a valid contract, then subsequent State statutes and orders of the Commission unconstitutionally impair the obligations of the contract in violation of Article 1, Section 10, of the Constitution of the United States, and also unconstitutionally confiscates the property of both the railway companies and the intervenors and denies to them the equal protection of the laws guaranteed by the Fourteenth Amendment of the Constitution of the United States; (3) Legislative Acts conferring in certain cases jurisdiction upon the Commission and withholding it in other cases are unconstitutional and violative of the Fouteenth Amendment of the Constitution of the United States; (4) the street railways have, under the Fourteenth Amendment, the right to cease operating its street railway in College Park.

## A FEDERAL QUESTION IS RAISED WHETHER OR NOT THE RATE ORDINANCE OF NOVEMBER 6, 1905, IS A CONTRACT.

If it be held that the claimed rate contract is still in existence, it is then contended that subsequent statutes of the State and orders of the Commission unconstitutionally impair the obligations of that contract in violation of Article 1, Section 10, of the Constitution of the United States.

This Court has repeatedly held that when the contract clause of the United States Constitution is invoked that it will determine for itself: (1) Is there a contract? (2) If so, what obligation arose from it? (3) Has that obligation been impaired by subsequent legislation?

> Detroit United Railway Co. vs. Michigan, 242 U. S. 238, 249;
>
> Milwaukee Electric Ry. Co. vs. Wisconsin, 252 U. S. 100, 103;
>
> Stearns vs. State of Minnesota, 179 U. S. 223, 232.

This Court determines these questions for itself for the reason that otherwise the State Courts might by their decision deprive parties of their federal constitutional rights.

> McCullough vs. Commonwealth of Va., 172 U. S. 102, 109.

Similarly when the Fourteenth Amendment of the Constitution of the United States is invoked against an ordinance confessedly discriminatory and confiscatory, and the claim is made that it is binding as a contract, determination of the question is a federal question; otherwise, the State Court in erroneously holding an ordinance or statute to be a contract might defeat the constitutional guarantee against the con-

fiscation of property, and deny to a party the equal protection of the laws.

San Antonio vs. San Antonio Pub. Service Co., 255 U. S. 547;

Southern Iowa Elec. Co. vs. Chariton, 255 U. S. 539;

Headleys, Admr., vs. San Francisco, 124 U. S. 639, 645.

In determining like questions this Court has refused to follow the State Court's construction of its own Constitution.

University vs. People, 99 U. S. 309, 323.

## I.

## RATE PROVISION OF ORDINANCE OF NOVEMBER 6th, 1905, NOT A CONTRACT.

This question is raised in the first assignment of error. (Records p. 5-6) Brief page 14-15.

### NOT IN SUBSTANCE A CONTRACT.

The ordinance (Record p. 63-64, Exhibit B,) begins "Be it ordained by the Mayor and Council of the City of College Park". It ends "Be it further ordained; that all ordinances or parts of ordinances in conflict herewith be and the same are hereby repealed."

Such words as to all the matters therein contained, including the rate section, indicate municipal legislation and not a municipal contract.

The Mayor and Council were not undertaking to fix a rate contract for itself. Under the Constitution of Georgia (Section 6563) it could make a contract for itself for only one year.

> Americus Ry & Lt. Co. vs. Mayor, &c, of Americus, 136 Ga. 25;
>
> City of Dawson Water Works Co., 106 Ga. 699, 726.

Such a contract would be operative only so long as neither party repudiated it.

> Knight vs. Suddeth & Crenshaw, 126 Ga. 231 (1).

The municipality replies to this case by alleging that the contract is not with or for the municipality, nor in the interest alone of the citizens of the municipality, but one made

by the municipality acting as agent for the State, and in the interest of all parties boarding or alighting from cars within the corporate limits of the municipality.

Such a regulation of fares, however, is governmental and not contractural.

> San Antonio Pub. Service Com. vs. San Antonio, 257 Fed. 467, affirmed in 255 U. S. 547;
>
> South Pasadena vs. Los Angeles, 41 Pac. 1094;
>
> Home Tel. & Tel. Co. vs. Los Angeles, 211 U. S. 265;
>
> State and County of Denver vs. Stenger, 277 Fed. 685;
>
> Georgia R. R. vs. Smith, 70 Ga. 694, 703, affirmed 128 U. S. 174, 180;
>
> Milwaukee Elec. Co. vs. Wisconsin, 238 U. S. 174.

In the case of City of Arcata vs. Green, et al., 106 Pac. 86, the Court, in passing upon municipal action claimed to be a contract, said:

> "The ordinance here does not confine its scope to any individual or number of individuals, but attempts to regulate the fares paid by the general public—all persons, wherever resident; in short, is of governmental character, and not a contract."

It is, however, conceded by the municipality that even though a contract, the State is not bound by its rate provision, but may, either by itself or by a Commission, having jurisdiction, change it at will. If this be so, then the contract provision lacks mutuality and cannot bind the street railways to this confiscatory rate.

Central Power Co. vs. City of Kearney, 274 Fed. 253 (2);

City and County of Denver vs. Stenger, 277 Fed. 865, 870;

Opelika Sewer Co. vs. City of Opelika, 280 Fed. 155, 159;

San Antonio vs. San Antonio Pub. Service Co., 255 U. S. 558.

Nor is the municipality bound by such rates.

Horkan vs. City of Moultrie, 136 Ga. 561;

Neal vs. Town of Decatur, 142 Ga. 205.

## MUNICIPALITIES IN GEORGIA GIVEN NO AUTHORITY TO ENTER INTO BINDING RATE CONTRACTS.

No Legislative enactments, no constitutional provision confers upon a Georgia municipality the power to make rate contracts.

City of Atlanta vs. Old Colony Trust, 88 Fed. 859;

Horkan vs. City of Moultrie, 136 Ga. 561.

Where no such power has been expressly conferred, this Court has repeatedly held that a confiscatory rate cannot be upheld on the claim that there existed a municipal rate contract.

Home Tel. & Tel. Co. vs. Los Angeles, 211 U. S. 265;

Milwaukee Elec. Co. vs. Wisconsin, 238 U. S. 174, 180;

City of Englewood vs. Denver & A. P. Ry. Co., 248 U. S. 294;

San Antonio vs. San Antonio Pub. Service Co., 255 U. S. 547;

Southern Iowa Elec. Co. vs. Chariton, 255 U. S. 539.

## GEORGIA CONSTITUTIONAL PROVISIONS PREVENT A MUNICIPALITY FROM MAKING RATE CONTRACTS.

The Constitution of Georgia prohibits the Legislature from making rate contracts. If the State cannot make rate contracts, then clearly it cannot grant such power to a municipality.

Town of Pacific Junction vs. Dyer, 19 N. W. 862, 863.

City of Mitchell vs. Board of R. R. Commissioners, 184 N. W. 246.

The Constitution of the State of Georgia, Article 1, Section 10, paragraph 2, provides: "No bill of attainder, ex post facto law, retroactive law, or law impairing the obligations of contracts, **or making irrevocable grants of special privileges or immunities, shall be passed.**"

This Court, in San Antonio vs. San Antonio Pub. Service Co., 255 U. S. 447, held that a similar constitutional provision of the State of Texas prevented a municipality of that State from entering into a binding contract and enjoined a confiscatory rate, although the municipality claimed the benefit of a rate contract.

The Constitution of the State of Georgia, Article 4, Section 2, paragraph 3, provides: "The exercise of the police power of the State shall never be abridged, nor so construed as to permit coporations to conduct their business in such a manner as to infringe the equal rights of individuals, or the general well being of the State."

In O'Keefe vs. City of New Orleans, 273 Fed. 560, the Court held that a similar provision of the Louisiana Constitution prevented a City of that State from claiming a binding confiscatory rate contract.

In Opelika Sewer Company vs. City of Opelika, 280 Fed. 155, the Court held that a constitutional provision of Alabama prevented a municipality of that State from making a binding rate contact.

In the City and County of Denver vs. Stenger, 277 Fed. 965, the United States Circuit Court of Appeals held that a constitutional provision of Colorado, similar to that of Georgia, prevented a municipality from making a binding rate contract. To the same effect,

City of New Orleans vs. O'Keefe, 280 Fed. 92;

City of Mitchell vs. Board of R. R. Commissioners, 184 N. W. 246.

## STREET RAILWAY COMPANIES HAVE NO POWER OR AUTHORITY TO ENTER INTO BINDING RATE CONTRACTS.

Public utilities are incorporated for the purpose of serving the public impartially equally without preference, and without discrimination, and therefore cannot enforce a claimed rate contract which prevents it from fulfilling the very purpose of its incorporation.

Thomas vs. United States, 101 U. S. 74 (4).

Article 4, Section 2, paragraph 1, of the Constitution of the State of Georgia provides: "The power and authority of regulating railroad freights and passenger tariffs, preventing unjust discriminations, and requiring **reasonable** and

just rates of freight and passenger tariffs are hereby conferred upon the General Assembly."

This power (to fix rates) is reserved by the Constitution to the State.

> Georgia Railway & Power Company vs. Town of Decatur, 152 Ga. 143, 146.

In Wyndotte Gas Co. vs. Kansas, 231 U. S. 622, the Court held that the statute giving a municipality the right to contract for reasonable and just rates prevented the enforcement of a rate when it became too high. Since the power was to make reasonable and just rates, the parties were unable to contract for unreasonable rates.

Similarly, the Georgia constitutional provision, supra, "preventing unjust discrimination, and requiring reasonable and just rates ..... passenger tariff" has the same effect. The municipality can no more enforce the discriminatory and confiscatory rate in the case at bar, than could the gas company in the Wyndotte case.

If the street railway and municipality each had express power to make rate contracts, this Georgia constitutional provision would have prevented the enforcement of an unjust, unreasonable and discriminatory rate.

This question cannot be better expressed than by paraphrasing the language of this Court on page 630 (231 U. S.). In the face of such a plain manifestation of the constitutional will, it would be a departure from the obvious intention of the purpose of the lawmaker to hold that the Constitution permitted the Legislature to confer the power to do that which the text makes it apparent there was a dominant and fixed purpose of the Constitution to forbid.

See also:

Tampa Water Works Co. vs. Tampa, 199 U. S. 241, 242;

State vs. St. Louis S. W. Ry. Co., 197 S. W. 1006

The Georgia Constitution, Article 4, Section 2, paragraph 2, is as follows:

"The exercise of the police power of the State shall never be abridged, nor so construed as to permit corporations to conduct their business in such a manner as to infringe the equal rights of individuals, or the general well being of the State."

This provision also prevents the railway company from making a binding rate contract.

City and County of Denver vs. Stenger, 277 Fed. 865;

Opelika Sewer Co. vs. City of Opelika, 280 Fed. 155;

O'Keefe vs. City of New Orleans, 273 Fed. 560, affirmed 280 Fed. 92.

## CLAIMED RATE PROVISION TERMINATED PRIOR TO INSTITUTION OF PRESENT SUIT.

(a) By adequate notice of its termination.

Where there is no constitutional inhibition, a State may by express language grant a municipality the power to make rate contracts for a limited time, not too long extended.

Home Tel. & Tel. Co. vs. Los Angeles, 211 U. S. 265.

This Court has in no instance upheld City-made rate contracts of indefinite duration or unreasonably extended.

By State action the claimed contract had become not only confiscatory but discriminatory, the continuance of which

"necessarily would have engendered the enforcement of two rates of fare over the same line leading to consequences dangerous to public interest, peace and tranquillity, the extent of which it would be difficult in advance to perceive."

City of Cleveland vs. Cleveland City Railway Co., 194 U. S. 517, 531.

Following the declaration of the Railroad Commission that the College Park rate was confiscatory and discriminatory, and beyond its power to change, the railway companies on October 5th, 1920, gave notice that the claimed rate would be terminated on the 20th of October, 1920 (Record p. 57, Exhibit E), thus terminating the rate.

Bearden Merc. Co. vs. Madison Oil Co., 128 Ga. 703;

Risley vs. City of Utica, 179 Fed. 875 (4), 885.

## RATE CONTRACTS INDEFINITE AS TO DURATION TERMINABLE UPON REASONABLE NOTICE.

The rate provision of November 6th, 1905, was indefinite as to duration and therefore terminable upon notice.

In the case of Texas Railway Company vs. City of Marshall, 136 U. S. 393, the City of Marshall gave the railroad company $300,000.00 in county bonds, and 66 acres of land in the city limits, in consideration that the company would permanently establish its western terminus, and maintain therein its machine shops and car works; this Court held that the contract was **performed** when the company had complied with it for a period of eight years, and until its interest and the public demand required the removal of the terminus and machine shops to some other place.

In the case of Jones vs. Newport News & M. Co., 66 Fed. 736, 741 (2), Chief Justice Taft, dealing with the contract to maintain a switch, said:

> "The petition makes no better case for the plaintiff on the theory of a contract than on a common law liability. It is not alleged that either the defendant or its predecessor agreed to keep the switch in the main line for any definite length of time, or that either expressly agreed to keep it there forever. The plaintiff contends that, nothing having been said as to the time, the implication is that the switch is to be maintained at all times, i.e., forever. Such a construction is quite at variance with the views of the Supreme Court as expressed in Texas & P. Ry. Co. vs. City of Marshall, 136 U. S. 393."

See also

Risley vs. City of Utica, 179 Fed. 873 (4), 885;

Western Union Tel. Co. vs. Pennsylvania, 125 Fed. 76;

Texas Ry. Co. vs. Scott, 77 Fed. 726 (2);

McCullough-Dalzell Crucible Co. vs. Philadelphia, 72 Atl. 633.

## RATE PROVISION TERMINATED BY ACTION OF THE STATE.

The rate in question was terminated by the Act of the State, though its commission, by making further compliance with the 5 cents fare discriminatory and illegal.

The orders of the Commission increasing the fare to 6 and then to 7 cents were equivalent to an Act of the Legislature making such increases.

Arkadelphia Milling Co. vs. St. Louis S. W. R. Co., 249 U. S. 134;

Oklahoma Operating Co. vs. Lane, 252 U. S. 331, 335.

These Acts of the State made the 5 cents College Park fare unjustly discriminatory, for it permitted the College Park traffic to ride for 5 cents while other passengers using the same cars, riding a less distance, are charged 7 cents.

City of Cleveland vs. Cleveland City Ry. Co. 194 U. S. 517;

State Ex Rel vs. Omaha C. B. & C. R. Co., 52 L. R. A. 315.

The Commission of Georgia expressly held, thereby establishing the fact (which is also admitted by demurrer), that the College Park rate was unjustly discriminatory

Manufacturers Co vs. United States, 246 U. S. 457, 481, 482.

That the Commission had no power itself to correct such discrimination did not in any way effect the discriminatory and illegal character of the rate.

Houston E. & W. T. R. Co. vs. United States, 234 U. S. 342.

When a rate contract becomes unjustly discriminatory, because of other rates fixed by State action, the discriminatory rate contract cannot be used either as a sword for offense, or a shield of defense, for it then comes under the ban of the common law.

Postal Cable Tel. Co. vs. Cumberland Tel. & Tel. Co., 177 Fed. 726, 728, and Georgia constitutional and legislative povisions.

## FORBIDDEN BY THE CONTITUTION OF THE STATE OF GEORGIA.

In the Constitution of the State of Georgia the following provisions appear:

Sec. 6463: "The power and authority of regulating railroad freights and passenger tariffs, preventing unjust discriminations, and requiring reasonable and just rates of freight and passenger tariffs are hereby conferred upon the General Assembly, whose duty it shall be to pass laws, from time to time, to regulate freight and passenger tariffs, to prohibit unjust discriminations on the various railroads of this State, and to prohibit said roads from charging other than just and reasonable rates, and enforce the same by adequate penalties."

Sec. 6464: " . . . . . the exercise of the police power of the State shall never be abridged, nor so construed as to permit corporations to conduct their business in such a manner as to infringe the equal rights of individuals, or the general well being of the State."

Sec. 6467: "No railroad company shall give or pay any rebate, or bonus in the nature thereof, directly or indirectly, or do any act to mislead or deceive the public as to the real rates charged or received for freights or passage; and any such payments shall be illegal and void; and these prohibitions shall be enforced by suitable penalties."

These constitutional provisions in and of themselves render discriminatory rate contracts illegal and unenforceable.

Rhode Island vs. Palmer, 253 U. S. 250, 386, 387 (6, 7);

Tampa Water Works Co. vs. Tampa, 199 U. S. 241;

State vs. St. Louis S. W. Rwy. Co. of Texas, 197 S. W. 1006;

California Adjustment Co. vs. Southern Pac. Co., 266 Fed. 349;

Hurley vs. Big Sandy, Etc., R. Co., 137 Ky. 216;

Gandolfo vs. Hartman, 49 Fed. 181;

Altenberg vs. Grant, 85 Fed. 345.

## FORBIDDEN BY THE STATUTE LAW OF GEORGIA.

Code Sections 2628 and 2629 are as follows:

"If any railroad corporation organized or doing business in this State under any act of incorporation or general law of this State now in force or which may hereafter be enacted, or any railroad corporation organized or which may hereafter be organized under the laws of any other State, and doing business in this State, shall charge, collect, demand, or receive more than a fair and reasonable rate of toll or compensation for the transportation of passengers or freight of any description, or for the use and transportation of any railroad car upon its track, or any of its branches thereof, or upon any railroad within this State which it has the right, license, or permission to use, operate, or control, the same shall be deemed guilty of extortion, and, upon conviction thereof, shall be dealt with as hereinafter provided."

"If any railroad corporation as aforesaid shall make any unjust discrimination in the rate or charges of toll or any compensation for the transportation of passengers or freights of any description, or for the use of transportation of any railroad car upon its said road, or upon any of the branches thereof, or upon any rail-

road connected therewith, which it has the right, license or permission to operate, or use within this State, the same shall be deemed guilty of having violated the provisions of this article, and, upon conviction thereof, shall be dealt with as hereinafter provided."

Under these statutes and the Constitution of the State, the College Park 5 cents fare is none the less discriminatory because fixed by a claimed contract.

Portland Railway, Light & Power Co. vs. R. R. Com. of Oregon, 229 U. S. 397, 414.

The Commission had been given no power or authority to remove this discrimination, but the fact of unjust discrimination being established, the Courts have jurisdiction to end it.

Houston East & West Ry. Co. vs. United States, 234 U. S. 342;

American Railway Express Co. vs. South Dakota, 244 U. S. 617;

Tift et al. vs. Southern Ry. Co. et al., 123 Fed. 789 (5).

The Court can remove the discrimination by raising College Park rates to that fixed by the Commission.

American Express Co. vs. South Dakota, 244 U. S. 617.

## A RATE NON-DISCRIMINATORY WHEN EXECUTED MAY SUBSEQUENTLY BECOME AN ILLEGAL AND DISCRIMINATORY RATE.

It is not enough that the rates were claimed to be non-discriminatory on the 6th of November, 1905. A rate contract, valid when made, may become illegal.

Armour Packing Co. vs. United States, 209 U. S. 56;

Louisville & Nashville R. R. Co. vs. Mottley, 219 U. S. 467, see page 484;

Elliott Machine Co. vs. Center, 227 Fed. 124, 126;

Leonard vs. American Life & Annuity Co., 138 Ga. 274, 276.

When the State of Georgia fixed rates elsewhere which rendered the College Park rate discriminatory, the ordinance of November 6th, 1905, having become discriminatory and confiscatory by State action was unenforceable as a valid rate contract.

Leonard vs. American Life & Annuity Co., 139 Ga. 274, 276;

Raymond Lumber Company vs. Raymond L. & W. C., L. R. A. 1917 C, page 574;

McLendon vs. City of LaGrange, 107 Ga. 357.

## RATE CONTRACT TERMINATED BY STATE ACTION MAKING RATE CONFISCATORY AS WELL AS DISCRIMINATORY.

In this discussion the various orders of the Commission are to be taken, as the Court took them below, in the demurrer, as valid.

On April 2nd, 1919 (Record page 56), and on April 15th, 1919 (Record page 46, par. 18), the Railroad Commission passed orders requiring free transfers to College Park patrons, thus enlarging and extending the College Park traffic unjust discrimination, and enabled them to ride over all the lines of the railway company for 5 cents, while other passengers are charged 7 cents merely to ride on the lines to which the College Park passengers were transferred.

The claimed contract fare provided only for a rate of 5 cents "For each passenger for passage from the southern limits of College Park to some central point in the City of Atlanta", whereas the order of the Railroad Commission made such fare operative in both directions. (Record p. 54, 150, 152, Exhibit I.)

The order of the Commission of September 22nd, 1920, increased the quality and quantity of street railway service with reference to College Park traffic. (Record p. 149.)

These orders increased the cost of serving College Park traffic to 13.957 cents per passenger, thereby making the 5 cents fare confiscatory.

Mississippi R. Co. vs. Mobile & O. R. Co., 244 U. S. 388;

Washington & P. C. Ry. Co. vs. Magruder, et al., 198 Fed. 218 (3);

Union Dry Goods Co. vs. Public Service Corp., 142 Ga. 841, 846.

The inability of the Commission to change the rate does not prevent the Court from declaring the rate unconstitutional, and in violation of the Fourteenth Amendment of the Constitution of the United States. Even if the Commission had fixed the rate the Courts can be appealed to.

Chicago Ry. Co. vs. Minnesota, 134 U. S. 418, 458;

Reagan vs. Farmers Loan & Trust Co., 154 U. S. 362;

Smyth vs. Ames, 169 U. S. 466, 526.

The Commission fixed an integral part of the rate when it required increased transportation and service.

Mississippi R. Co. vs. Mobile & O. R. Co., 244 U. S. 388;

Washington & P. C. Ry. Co. vs. Magruder et al., 198 Fed. 318 (3).

The fact that the deficiency in College Park traffic is made up by requiring other passengers to pay higher rates does not prevent the claimed contract rate, plus the transportation service required, being unconstitutional and confiscatory.

Vandalia Railroad Co. vs. Schnull, 255 U. S. 113;

N. & W. Ry. Co. vs. W. Va., 236 U. S. 605;

No. Pac Ry Co vs. North Dakota, 236 U. S. 585.

The intervenors are parties living upon the College Park line, but not in College Park. If the deficiency of the College Park service be made up by charging these intervenors a higher rate of fare their property would be confiscated.

Vandalia Railroad Co. vs. Schnull, 255 U. S. 113, 118.

## RATE PROVISION TERMINATED BY LEGISLATIVE ACTS OF GEORGIA EXTENDING TERRITORIAL LIMITS.

When the claimed contract provision was passed the incorporate limits of College Park included only a small part of the College Park line. The Legislature (Georgia Laws 1906, page 650) extended the limits of College Park towards the

City of Atlanta, thereby taking in a portion of the College Park line not theretofore in the limits of the municipality. The State Court held that this Legislative Act extended the 5 cents rate to all passengers leaving or boarding cars within this added territory, thus increasing the number of passengers to be served at the confiscatory rate, and increasing the losses theretofore sustained.

On the line of reasoning adopted by the Court, the Legislature, by appropriate extension of College Park to take in all the lines of the street railway, applied to them this 5 cents confiscatory fare. The Legislative Act in question, thus being construed, increased the service to be rendered for the claimed 5 cents fare, making such rate confiscatory

## II.

## SECOND ASSIGNMENT OF ERROR.

In the second assignment of error (Record p. 6 (2), this brief page 16 supra) intervenors attacked further compliance with this 5 cents fare, in that it denies to them and all other patrons of the railway company (other than the College Park traffic) the equal protection of the law guaranteed by the Fourteenth Amendment of the Constitution of the United States, for that the intervenors pay 7 cents fare for less service, while the College Park patrons enjoy 5 cents fare for a greater transportation service.

The intervenors claim a separate and independent right to have this fare declared unconstitutional. The College Park patrons pay 5 cents, whereas the intervenors on the same cars, for less service, pay a Legislative fixed rate of 7 cents. The Legislature could have given the Commission jurisdiction over this 5 cents rate. Its failure to do so was a Legislative recognition of such rate.

If the Legislature had, itself, fixed a 7 cents fare on all the College Park lines, except for such passengers as embarked or disembarked in College Park, and had for them fixed a 5 cents fare, there could have been no question but that the intervenors had been denied the equal protection of the law guaranteed by the Fourteenth Amendment of the Constitution of the United States.

Cotting vs. Goddard, 183 U. S. 79;

Gulf C. & S. F. R. Co. vs. Ellis, 165 U. S. 150, 159;

Yick Wo vs. Hopkins, 118 U. S. 356;

Connally vs. Union Sewer Pipe Co., 184 U. S. 539, 556.

The intervenors were not parties to the College Park contract. The Legislative rate is binding upon them. That fact renders a municipal rate unconstitutional when attacked by them. The intervenors are not inhabitants of College Park, and the municipality cannot bind them by illegal and discriminatory contract rates.

The above discussion, under the first assignment of error, is, though not repeated, applicable here.

## III.

## THIRD ASSIGNMENT OF ERROR.

In section (a) of the third assignment of error (Record p. 6 and 7, also in brief page 17) the Act of the State of Georgia of 1907, pages 73 et seq., amended by the laws of 1919, page 94, as construed and enforced by the State Courts, is attacked as being violative of the Fourteenth Amendment to the Constitution of the United States, in that there is no reasonable classification with reference to contracts excepted and those placed under the Commission's jurisdiction.

The Railroad Commission of the State of Georgia was created by the Acts of 1878-79, page 125 et seq., and would have applied to street railway companies had not the Act expressly excluded them.

Savannah Railway Company vs. Williams, 117 Ga. 420.

The Acts of 1907, page 73 et seq., extended the powers of the Railroad Commission over street railways. The first part of Section 5 of this Act, now embodied in Section 2630 of the Code of Georgia, provided: "The power to determine what are just and reasonable rates and charges is vested exclusively in said Commission".

A part of Section 5 of said same Act, now Code Section 2662, provides: "The powers and duties heretofore conferred by law upon the Railroad Commission are hereby extended and enlarged, so that its authority and control shall extend to street railroads, and street railroad corporations, companies, or persons owning, leasing, or operating street railroads in this State. Provided, however, that nothing herein shall be construed to impair any valid subsisting contract now in existence between any municipality and any such company."

The Act of August 18th, 1919, page 94, amended Code Section 2662, by adding at the end thereof the following provisions, to-wit

"Provided that the above proviso, to-wit: 'that nothing herein shall be construed to impair any valid, subsisting contract now in existence between any municipality and any such company', shall not apply to any suburban and street railroad company which has its principal office and operates lines of railroads in coun-

ties having a population of not less than 75,000 and not more than 125,000 population."

In the mandamus case, and in the case at bar, the railway companies contended that the fixing of rates by the Commission would not impair the obligations of the contract, because under the decisions of this Court, the changing of a contract rate by the Commission would not impair the obligations of such contract, even though the contract had been made prior to the statute creating the Commission.

Producers Trans. Co. vs. Railroad Commission of Cal., 251 U. S. 228, 232;

City of Englewood vs. Denver S. P. Ry. Co., 248 U. S. 294.

The State Court held, however, that the claimed contract provision deprived the Commission of jurisdiction to fix rates in College Park.

Georgia Railway & Power Company vs. Railroad Commission of Georgia, 149 Ga. 1.

The fixing of the street railway fares, falling under the jurisdiction of the Railroad Commission, after that decision caused the discrimination and illegality of the College Park rate.

It is immaterial whether the Act or the proviso or exceptions to the Act was or was not considered constitutional when the Act was passed. The Act or the proviso may become unconstitutional as the result of future developments, or the method of enforcing it, or future construction of the Act by the highest State Court.

Municipal Gas Co. vs. Public Service Commission, 225 N. Y. 89, 121 N. E. 772;

Castle vs. Massa, 91 Ohio State 296, 110 N. E. 464.

Taking the State Court's construction there is no legal or reasonable classification as to the contracts excepted and those placed under the Railroad Commission's jurisdiction. Reasonable classification does not deny equal protection of the law, but one based on no adequate reason is invalid.

> Kansas City So. Ry. Co. vs. Road District, 256 U. S. 658.

The Act as thus amended, and as construed by the State Court, only excepted from the Commission's jurisdiction rate provisions as to fares made prior to 1907 by a municipality (not for itself, but for individuals) where the street railway company has its principal office and operates lines of railroad in counties having a population of less than 75,000 and more than 125,000.

It conferred jurisdiction upon the Commission to change or alter rates though fixed in any other contracts, whether made prior or subsequent to 1907. It is, therefore, evident that the Legislature did not undertake to make a classification based on the time of the execution of the contract.

It did not undertake to make a separate classification of municipal contracts for some made prior to 1907, and all made subsequent thereto are placed under the Commission's jurisdiction.

It included under the Commission's jurisdiction rate contracts made by individuals for themselves.

> Union Dry Goods Co. vs. Public Service Corporation, 142 Ga. 841, 846.

When the Act gave the Commission jurisdiction to change rates fixed in contracts made by individuals for themselves, it could not except from the Commission's jurisdiction a

similar rate contract made by a municipality for other individuals.

No legal or reasonable classification exists as to municipal rates, merely because the principal office of the street railway company may happen to be located in a county having under 75,000 or over 125,000 population, and those whose principal office is located in a county having a population between 75,000 and 125,000; the first being held as being excluded from the jurisdiction of the Commission, and the latter as included.

The Act of 1907, with its proviso, as construed by the State Court, makes no reasonable classification as to rate contracts; the Act and the orders of the Commission establish a discriminatory scheme of rates and recognizes no distinction as to the Commission's power to regulate the quality and quantity of service, whether the rate for the service is placed within or without the Commission's jurisdiction.

Lake Shore & Michigan So. Ry. Co. vs. Smith, 173 U. S. 684;

Chicago, R. I. & P. Ry. Co. vs. Ketchum, 212 Fed. 896;

Leonard vs. Am. Life & Annuity Company, 139 Ga. 274 (5), 277 (5);

Traux vs. Corrigna, 257 U. S. 312.

When the Legislature is empowered to place all rate contracts under the Commission's jurisdiction, it cannot place some and except others within the same class and relating to the same service, without rendering said Act unconstitutional and violative of the Fourtenth Amendment of the Constitution of the United States.

Cotting vs. Goddard, 183 U. S. 79;

Gulf, Colorado & Sante Fe Ry. Co. vs. Ellis, 165 U. S. 150, 165.

Connolly vs. Union Sewer Pipe Co., 184 U. S. 539, 556.

Yick Wo vs. Hopkins, 118 U. S. 356;

Louisville & N. R. Co. vs. Railroad Commission of Tenn., 19 Fed. 697;

Western Ry. of Ala. vs. Railroad Commission of Ala., 197 Fed. 954 (5 and 6), page 973.

## SUB-PARAGRAPH (C) OF THE THIRD ASSIGNMENT. OF ERROR.

This assignment attacks the Act of 1907, as establishing a discriminatory scheme of rates as against the intervenors, the case supra controlling on this assignment of error.

## SUB-PARAGRAPH (B) OF THE THIRD ASSIGNMENT OF ERROR.

(Record, page 7, this brief page 17 supra.) Now the State Court holds that the Act of 1907 supra withholds from the Commission any authority to change the rate of fare of November 6th, 1905, but that said Act conferred on the Commission authority to increase the quantity and quality of service rendered thereon. That under the said Act the Commission (a) can require the issuance of free transfers; (b) make the rate operative from Atlanta to College Park; (c) increase the quality and quantity of service; although it could not change the 5 cents fare. These orders of the Commission greatly increased the cost of the

College Park service, so as to make the actual cost 13.957 cents per passenger. Such orders unconstitutionally confiscate the property of the street railway companies.

Mississippi R. R. Coms. vs. Mobile R. Co., 244 U. S. 388;

Washington & P. C. Ry. Co. vs. Magruder, 198 Fed. 218 (3, 4);

Giving such construction and effect to this Act, it is unconstitutional;

Detroit Union Ry. Co. vs. Michigan 242 U. S. 238.

## IV and V

## FOURTH AND FIFTH ASSIGNMENTS OF ERROR.

(Record, p. 8, in this brief pages 18 and 19 supra.)

The State Court held that the rate provision of the ordinance of November 6th, 1905, was a valid and binding contract, and taken as such it suspended, during the life of the contract, all governmental powers which affect the rate of fare in question.

Home Tel. & Tel. Co. vs. Los Angeles, 211 U. S. 265.

No obligation is found in the ordinance of November 6th, 1905, requiring the giving of transfers (See record, pages 53, 54, Exhibit B).

On April 2nd, 1919, and on April 15th, 1919, the Commission ordered the issuing of universal free transfers on payment of 5 cents fare. This order, pleaded by the municipality, unconstitutionally impaired the obligations of the contract.

Detroit United Ry. Co. vs. Michigan, 248 U. S. 429, 436, 437.

The contract provided only for a 5 cents fare "From the southern limits of College Park to some central point in the City of Atlanta." An order of the Commission (Record page 150, 152, Exhibit I) makes such fare operative from other points in the City of College Park, and other points in the City of Atlanta, and from Atlanta to College Park. The order of the Commission of September 22nd, 1920, required an increase in the quantity and quality of service not provided for in the contract. (See order record page 149). Each of these orders of the Commission are violative of Article 1, Section 10, of the Constitution of the United States.

These orders of the Commission were passed under and by virtue of the Legislative Act of the State of Georgia, (Acts 1907, page 73 et. seq.).

The judgment of the court in sustaining the general demurrers to the answers and cross bills, and the refusing of the written request to charge (set out on page 33 of the record) gave effect to the said orders of the Commission, and to Act under which it was held that the Commission had jurisdiction to pass such orders.

Detroit United Ry. Co. vs. Michigan, 242 U. S. 238;

Louisiana Ry. Co. vs. Behrman, 235 U. S. 164, 170;

Mississippi Railroad Commission vs. Mobile R. Co., 244 U. S. 388;

Washington & C. Ry. Co. vs. Magruder, 198 Fed. 218, (3, 4).

## VI.

## SIXTH ASSIGNMENT OF ERROR.

The assignment of error here raised also attacks the Act of the State of Georgia (Acts 1906, page 650), in that said

Act unconstitutionally impairs the obligations of the contract of November 6th, 1905, and impairs the previous contract entered into between the County of Fulton and the electric company.

When the fare contract of November 6th, 1905, was entered into, only a small part of the street railway lines was situated in College Park. Giving that contract its widest construction, it only applied to that part of the line then within the corporate limits of the municipality.

The Act of 1906 (Georgia laws 1906, page 650) extended the limits of College Park due north a distance of 780 feet, taking in a portion of the street railway line theretofore built under the contract with the County of Fulton.

The action of the Court in sustaining the demurrer and in refusing to give written request to charge (page 32-33 of the Record) made applicable the 5 cents fare to this annexed territory. On the contrary, there would be a right resting under the former franchise with Fulton County to charge 7 cents to the extended territory, the same as is charged on all other portions of the line from College Park to Atlanta.

The judgment of the Court below requiring 5 cents rate of fare over this portion of the line rests under this Act extending the territory. It follows, therefore, that this Act, and the effect given to it, impairs the contract of the street railway company with the County of Fulton, and also adds to the burden of the contract of November 6th, 1905, in violation of Article 1, Section 10, of the Constitution of the United States.

Detroit United Ry. Co. vs. Michigan, 242 U. S. 238;

United States vs. Memphis, 97 U. S. 284.

It is not necessary that the State Court's decision mentioned said Act, since its decision gave effect to it.

Houston vs. Texas C. Rd. Co., 177 U. S. 66, 67.

## VII.

## SEVENTH ASSIGNMENT OF ERROR.

(Record page 9, page brief 21 of this record.)

In the answers and cross bills there was an express offer of surrender of all the rights and privileges granted the street railway by the municipality of College Park within its corporate limits, if the fare provision of November 6th, 1905, was held to be legal and enforceable. This 5 cents fare is confiscatory in that it deprives the street railway of a fair return on its property used in furnishing the service, and also failed to pay one-half the operating costs of furnishing said service.

It is contended that if the rate provision could not otherwise be repudiated, the street railway had the right to surrender and forfeit its privileges of operating the line within College Park. Therefore, the street railway desired to surrender all its rights within the municipality, and asked that it be allowed to cease operations thereon.

A public utility corporation has the right to surrender its franchise within a municipality.

Fletcher on Corporations, Section 1777, page 2130;
Fletcher on Corporations, Section 826, page 1794;
Fletcher on Corporations, Section 4425, page 7718.

There is no provision in the claimed contract between the railway company and College Park that the street railway company is perpetually to operate its lines in College Park. If there had been, it could have been terminated under the facts set out in the answers and cross bills.

Texas & P. Ry. Co. vs. City of Marshall, 136 U. S. 393.

The street railway company cannot be compelled to perpetually carry College Park traffic at a loss.

Vandalia R. R. Co. vs. Schnull, 255 U. S. 113;

Brooks-Scanlon Co. vs. R. R. Com. of La., 251 U. S. 291, 299;

North Pac. Ry. Co. vs. North Dakota, 236 U. S. 585;

Norfolk & Western Ry. Co. vs. West Virginia, 236 U. S. 605.

The deficiency could not be legally made up by increasing the fare to be charged other passengers of the street railway company.

Vandalia R. R. Co. vs. Schnull, 255 U. S. 113.

The Railroad Commission cannot increase the quantity and quality of College Park service, and put the cost of such service upon other patrons, or upon intevenors, for that would be compelling them to pay a higher rate for their service, and their property would be unconstitutionally confiscated.

Vandalia R. R. Co. vs. Schnull, 255 U. S. 113, 118.

Respectfully submitted,

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Atlanta, Ga.,

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